Inter-Disciplinary Advantage, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Case 7–CA–48706

March 15, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

On August 8, 2006, Administrative Law Judge George Alemàn issued the attached decision. The Respondent filed exceptions and supporting argument, the General Counsel filed cross-exceptions and an answering brief opposing the Respondent's exceptions, and the Respondent filed an answer to the General Counsel's cross-exceptions and a reply to the answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt his recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Inter-Disciplinary Advantage, Inc., Midland, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.[4]

Dated, Washington, D.C. March 15, 2007

Wilma B. Liebman, Member

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[1] The General Counsel's cross-exceptions request the Board to correct several errors in the judge's decision, such as misspellings, typographical errors, misnomers, and mistaken references. The Respondent endorsed some of these changes, but opposed others, contending that the judge's meaning was unclear. We disagree. Based on the entire record and the context of the portions of the decision in question, we find that the judge's intention was clear with regard to these and other similar oversights. We find merit in the General Counsel's cross-exceptions and have corrected the judge's decision accordingly. In addition, we have corrected a second erroneous reference to "Lashbrook" in the fifth paragraph of sec. II, A., to "Haack."

No exceptions were filed with respect to the judge's dismissal of 8(a)(3) and (1) allegations with respect to the discharge of Tammy Bibbee.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also contends that some of the judge's credibility resolutions are the product of bias. On careful examination of the judge's decision and the entire record, we are satisfied that these contentions are without merit.

[3] In its answer to the complaint, the Respondent admitted the supervisory and/or agency status of Deborah Pettyplace, Diane Davis, Kasie Prevatt, and Mark Romain. The Respondent did not except to the judge's findings, based on credited testimony, that Romain violated Sec. 8(a)(1) through various statements and questions to employees during the early part of their organizing effort.

In adopting the judge's determination that the Respondent unlawfully discharged Marie Abrakian, we find it unnecessary to rely on his characterization of the Respondent's belated assertion that she breached its confidentiality rule as evidence of a shifting defense. Although the Respondent did not explicitly cite a breach of the confidentiality rule in her discharge letter, its posthearing brief to the judge asserts that Abrakian's alleged theft of the budget document violated its confidentiality rule. Thus, the Respondent argued, in effect, that its confidentiality argument was not raised belatedly, but inferentially in the discharge letter. We need not pass on the merits of this contention because we find that the other evidence the judge relied on amply supports his finding that the Respondent's asserted reasons for Abrakian's discharge were pretextual.

Member Kirsanow finds it unnecessary to rely on the judge's statement that a discharge pursuant to an overbroad confidentiality rule is necessarily unlawful.

[4] The notice in the judge's decision fails to include the requirement that the Respondent rescind its overbroad confidentiality rule. We have substituted the attached notice, which conforms to the Order.

WE WILL NOT maintain or enforce a confidentiality rule that restricts you from fully exercising the rights accorded to you under Section 7 of the National Labor Relations Act; WE WILL NOT create the impression that your union activities are being kept under surveillance; WE WILL NOT threaten you with discharge for engaging in union activities; WE WILL NOT coercively interrogate you about your union activities; WE WILL NOT prohibit you from talking about the union at the workplace while allowing other nonwork-related discussions; WE WILL NOT unlawfully solicit and impliedly promise to remedy your grievances in order to discourage your support for a union; WE WILL NOT coercively question you about discussions you may have had with agents of the National Labor Relations Board; and WE WILL NOT ask you to provide us with copies of affidavits you may have given to the Board.

WE WILL NOT discharge or otherwise discriminate against employees Kelly Lashbrook, Linda Foran, Marie Abrakian, or any of you for supporting International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind and cease giving effect to the overbroad confidentiality statement.

WE WILL, within 14 days from the date of this Order, offer Kelly Lashbrook, Linda Foran, and Marie Abrakian full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Kelly Lashbrook, Linda Foran, and Marie Abrakian whole for any loss of earnings and other benefits resulting from their unlawful discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Kelly Lashbrook, Linda Foran, and Marie Abrakian, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

INTER-DISCIPLINARY ADVANTAGE, INC.

Linda Rabin Hammell, Esq. and *Jennifer Y. Brazeal, Esq.,* for the General Counsel.
Daniel A. Gwinn, Esq., for the Respondent.
Georgi-Ann Bargamian, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. Pursuant to a charge filed on June 22, 2005, and amended on July 28, 2005,[1] by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union), the Regional Director for Region 7 of the National Labor Relations Board (the Board), on August 12, issued a complaint alleging that Inter-Disciplinary Advantage, Inc. (the Respondent) had, in various manner, violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Specifically, the complaint alleges that the Respondent violated Section 8(a)(1) by maintaining an overly broad confidentiality rule;[2] prohibiting employees from engaging in union talk while allowing other nonwork-related discussions; threatening to discharge employees who supported or discussed the Union at the workplace; interrogating employees about their union activities or sympathies; creating the impression that it was keeping employee union activity under surveillance; by soliciting employee complaints and grievances and implicitly promising to remedy them in order dissuade them from supporting the Union; and questioning employees about discussions they had with Board agents regarding this case, and asking employees to provide it with copies of affidavits they may have given to the Board.[3] The complaint also alleges that the Respondent violated Section 8(a)(3) and (1) by discharging employees Linda Foran, Kelly Lashbrook, Marie Abrakian, and Tammy Bibbee because of their union activities, and to discourage employees from engaging in such activities. By answer dated August 16, the Respondent denied engaging in any unfair labor practices.

A hearing in this matter was held in Detroit, Michigan, on separate dates between October 31 and December 15, at which all parties were afforded a full and fair opportunity to be heard, to present oral and written evidence, to examine and cross-examine witnesses, and to argue orally on the record. Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

[1] All dates are in 2005, unless otherwise indicated.

[2] The confidentiality rule, a copy of which was entered into evidence as R. Exh. 22, states that "[a]ny and all information regarding business, employees of Inter-Disciplinary Advantage, Inc., and/or individuals served in IDA homes which is conducted in this office is strictly confidential. Any breach of this confidentiality will result in disciplinary action up to and including immediate dismissal."

[3] The complaint was amended at the hearing to include the allegation regarding the questioning of employees about discussions they had with Board agents, and its request for copies of employee affidavits. Complaint par. 12, alleging that the Respondent, through Agent Mark Romain, threatened employees by stating that the discharge of three employees was related to their union activity, was withdrawn by the General Counsel on brief.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporate entity with its main office in Midland, Michigan, is in the business of providing licensed adult foster care services in the State of Michigan. During the fiscal year ending September 30, 2004, a representative period, the Respondent had gross revenues in excess of $200,000, and during the same period, purchased and received at its Michigan facilities goods and materials valued in excess of $50,000 directly from points located outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE RELEVANT FACTS

A. General Background

The Respondent operates four residential homes for adults with disabilities and/or mental illnesses, including the Morowske Home located in Shelby township, Michigan, the site of the alleged complaint violations. The Respondent is managed and run by its executive director, Deborah Pettyplace. Below Pettyplace in the managerial/supervisory chain of command is a program coordinator who has supervisory responsibility over several homes. Each home is, in turn, managed and directly supervised by a home supervisor. At all times relevant herein, Diane Haack served as the home supervisor for the Morowske Home, and answered to Diane Davis, the program coordinator for the Morowske Home and Lillian House, another of Respondent's homes. Alleged discriminatees Lashbrook, Foran, Abrakian, and Bibbee, all worked at the Morowske Home prior to discharge. Employees Randi Schwark, Mariana Jenkins, Kelly Hibbs, and Tracy Gevedon were also employed at the Morowske Home at the time. The Respondent also has a medical coordinator at the Morowske home. Foran was medical coordinator until April 1, at which time she was replaced by Lashbrook. (Tr. 61.) The medical coordinator's duties include recording medications prescribed by doctors to Morowske's consumers into the Home's medication records.

The Morowske Home houses approximately six consumers or residents who are cared for and looked after on a 24-hour basis by a direct care staff of 10 employees who work either a morning shift (6 a.m.–2 p.m.), an evening shift (2–10 p.m.), or a night shift (10 p.m.–6 a.m.) Employees are expected to record the time they begin and end their particular shift on a payroll or log sheet prepared by the Morowske Home supervisor twice a month.[4] They are also required to sign the timesheet. Pettyplace and Davis both testified that under established Company policy, employees are required to sign the payroll sheet at the end of the pay period. (Tr. 888; 1611.) While the Company's employee handbook does indeed state that employees "must sign the timesheet," it makes no mention of when the signing was to occur, e.g., beginning or ending of the pay period. Further, Haack testified that when she was first hired, she was instructed by the former Home manager, Stephanie Gore, to sign the timesheet at the beginning of the pay period, that she has always done it this way, and that, when she became Home manager, she and other employees adhered to this practice. Haack's testimony in this regard was corroborated by employees Lashbrook and Foran. (Tr. 66; 87; 335; 401.) Thus, while employees were obviously required under the employee handbook to sign the payroll timesheet, I am not convinced, particularly since the handbook is silent on the matter, that they were expected or required to do so at the end of the pay period, as claimed by Pettyplace and Davis. As more fully discussed infra, neither Pettyplace nor Davis were particularly credible witnesses. I find instead that, as testified to by Haack, Lashbrook, and Foran, employees were told and expected to sign their names on the payroll timesheets at the start, rather than the end, of the pay period, and that this has been the accepted practice at the Morowske Home.

The direct care employees' functions and duties include bathing the Morowske Home residents, cooking for them, providing them with medication, occasionally scheduling medical appointments for residents and, when necessary, taking residents to medical appointments and other locations, including a facility known as the clubhouse or friendship house, in a Company-owned van.[5] Employees utilizing the company van are required to record in a van log kept inside the vehicle their destination, the amount of gas in the vehicle at the time, the number of miles on the odometer before and after the trip, and his or her initials.

In March, Foran was the medical coordinator at the Morowske Home. Haack testified that sometime in March, Pettyplace asked her to prepare a health care chronological for Dugal showing his doctors' appointments for the month. Pettyplace admits making such a request, explaining that she did so "just to look at them, to scan them to see what was on them, to see where the consumers had gone." (Tr. 854.) According to Pettyplace, the chronological form has been in use at the Morowske Home for as long as she could remember. She contends Haack seemed to know what form she was referring to when she made the request. Lashbrook, however, testified that she had not seen the health care chronological form before April, when she became the medical coordinator.[6]

[4] The Respondent operates on a 2-week payroll period. Employees are generally paid on the 10th and 25th day of the month.

[5] The Respondent utilizes a health care chronological record to document the medical appointments consumers are taken to, and the medication received. (See GC Exh. 4.) Entries in the health care chronological are generally made by the employee after the appointment. There is also a medication or "med" sheet used to record the medications prescribed to a Home consumer by the attending physician.

[6] The Respondent offered into evidence as R. Exh. 28 health care chronologicals of other residents covering the months of March through April. It did not, however, produce health care chronologicals for any period before March. Pettyplace's claim, therefore, that the health care chronological form has been in use at the Morowske Home for as long as she could remember, which contradicts Lashbrook's claim that she was, prior to April, unfamiliar with the health care chronological, lacks corroboration. It would have been an easy matter for the Respondent to refute Lashbrook's above claim by producing other health care chronologicals for periods before March. It did not do so, leading me to doubt Pettyplace's veracity on this matter.

Haack nevertheless complied with Pettyplace's directive and instructed Foran, the Morowske Home medical coordinator at the time, to complete the health care chronological for Dugal. Foran testified that in late March, as instructed by Haack, she filled out a health care chronological for Dugal showing doctors' appointments that had taken place or were scheduled to occur from March through April. (See GC Exh. 4.) In completing the health care chronological, Foran obtained the information regarding scheduled doctors' appointments from a large calendar that was generally used to record appointments and other matters. Regarding General Counsel Exhibit 4, Foran testified that the entry therein showing Dugal scheduled for a physical examination with a Dr. Lovy was entered long before the date of the appointment, and that the appointment itself, like most other such appointments, are scheduled a month, sometimes two months, in advance.

In late February or early March, Abrakian, Lashbrook, and Foran began discussing among themselves the benefits of having, and the need for, a union to represent them. In late March, Abrakian called several of the Union's Regional offices to get information on how she and the others could organize themselves. As a result of those phone calls, Abrakian agreed to meet on April 4, with a representative of the Union at the Union's Local 155 office. On March 28 and 29, Abrakian contacted all of her coworkers at the Morowske Home to advise them of the meeting, and, with the exception of Jenkins who did not return her call, received positive responses from all. Abrakian testified that she also left a note in each employee's mailbox at Morowske Home notifying them of the time and place of the union meeting. The meeting was to be held on April 4, at the Union's local hall situated some 22 miles round trip by car from the Morowske Home. Lashbrook and Foran corroborated Abrakian's account of having had a discussion in March about organizing themselves, and of being told by Abrakian of the April 4 union meeting. Bibbee likewise admits receiving a call from Abrakian advising her of the April 4 union meeting.

In late March, Haack received from Davis a copy of the Morowske Home budget, something she had been requesting from Davis for some time. Haack claims that she, and Lashbrook, who preceded her as Morowske Home supervisor, had been asking to see the budget because of concerns they had that things were not being taken care of the way they should have been. (Tr. 634; see GC Exh. 5.) Haack recalls Davis handing her the budget, along with several other documents, and stating, "I finally got the budget for you." Other than asking Haack to look over the budget and to tell her what she thought about it, Davis did not instruct Haack on how or where it should be retained. As she was preparing to leave the Home for the day when she received the budget and other documents, and had consequently locked her office, Haack took the items given to her by Davis that were labeled "confidential" in red and slid them under her office door. As to the budget, which was not marked confidential, Haack simply placed it on a counter situated between the kitchen and a sitting room, an area generally open to all other employees, as well as consumers and visitors, and where items such as a stapler, fax machine, stamp pads, etc., are kept. The next day, she reviewed the budget with Lashbrook and made some notations on it.

Abrakian testified that, while working her shift, she came across the budget on the counter where Haack had left it. She reviewed it and found it of some interest because of suspicions she had that funds were being misappropriated at the Morowske Home. Abrakian believed that the budget was a public document because, in her view, the Respondent was a nonprofit organization. Abrakian photocopied the budget and took the copy home with her, leaving the original on the counter. Abrakian denied sharing or showing the budget with anyone else. She did admit that when first hired, she signed a confidentiality statement. She also recalls seeing a copy of the employee handbook containing Respondent's policies but claims she never actually received a copy. One policy in the handbook prohibits the removal by employees of property, equipment, or supplies belonging to the Respondent without express permission from the employer or supervisor. Because of her belief that the Respondent was a nonprofit organization and that information pertaining to the Home was a matter of public record, Abrakian did not believe her taking the budget amounted to a violation of the above policy.

The April 4 union meeting was scheduled for 11 a.m. Lashbrook, Foran, and Home Supervisor Haack reported for their morning workshift that day at 7 a.m. Both Lashbrook and Foran asked and received permission from Haack to leave early that day as both planned on attending the 11 a.m. union meeting. Lashbrook told Haack her reason for leaving early was to attend to some banking problems, while Foran did not cite any specific reason for wanting to do so. The record reflects that Abrakian, on Saturday, April 2, left a note for Haack in the staff log stating that resident Daniel Dugal seemed ill that day and had complained of having an earache and that she or someone else would check on Dugal again the following day. (R. Exh. 6.)[7] Haack corroborated Lashbrook's and Foran's account that they requested and were granted permission to leave work early on April 4. (Tr. 587–588.)

On arriving to work on Monday, April 4, and learning of Dugal's earache complaint, Haack advised Lashbrook and Foran that, when Dugal woke up, they should question him to see if anything was wrong, and try to schedule him to be seen by his doctor. Lashbrook testified that because Dugal already had a doctor's visit scheduled for April 7, for a physical exam, she called the doctor's office between 8:30–9 a.m. on April 4, to see if Dugal's April 7 appointment could be moved up to April 4, so that Dugal could be seen that day.[8] The doctor's receptionist, however, told Lashbrook that if she could get Dugal into the office between 10–10:30 a.m., she might be able to get Dugal seen by a different doctor, but that any such visit could not be combined with Dugal's April 7 scheduled physical exam. (Tr. 72.) Around 8:30 a.m. that morning, Haack was told by Foran that Lashbrook had been unable to secure an

[7] The staff log is used by staff members to let others know what's going on in the Home with patients and other matters.

[8] An appointment for Dugal to receive a physical examination from his physician, Dr. Lovy, on April 7, had been scheduled and arranged several months earlier, on February 22, 2005. (See GC Exh. 39.)

appointment for Dugal with his physician that morning. Foran recalls Lashbrook passing on this information to her around 8 a.m. Lashbrook admitted conveying this information to Foran but not to Haack.

Both Lashbrook and Foran testified that between 9:30 and 10 a.m. that morning, they used the Company van to drive Dugal and three other residents to the clubhouse.[9] They testified that they went directly to the clubhouse and nowhere else. Lashbrook could not recall filling out the van log, but believes she may have done so on April 4. She explained, without contradiction, that employees do not always record every stop they may make in the Company van. By way of example, Lashbrook pointed out that employees may, at times, take residents to a K-Mart to cash their checks, or to get cigarettes and not record these stops in the van log. She could not recall, however, any employee ever being disciplined for recording inaccuracies in the van log.

On arriving at the clubhouse, Lashbrook and Foran helped the residents off the van, and handed them their lunches and cigarettes. The whole process, according to Lashbrook and Foran, took only a few minutes. They then drove back to Morowske Home, arriving around 10:30 a.m. When they returned to Morowske Home, Lashbrook gave Haack her set of Company keys. Both Lashbrook and Foran testified, without contradiction, that, shortly thereafter, they got into Lashbrook's car and drove to the union meeting. Although she and Foran signed the log sheet when they first reported for work that morning, neither signed out for the day on April 4. Haack testified that she, in fact, filled in Foran's exit time for April 4, on April 15, the end of the payroll period because Foran, at the time, was out of town and could not be reached. She explained that, when she did so, she did not pay attention to the fact that Foran had left early on April 4.

Lashbrook and Foran arrived at the union meeting some 15 minutes late, e.g., around 11:15 a.m. Lashbrook observed that employees Abrakian, Bibbee, and Schwark, were already there, as were the union representatives. Abrakian gave employee Schwark a ride to the union meeting in her car. Abrakian admits taking the copy of the budget with her to the meeting along with some other documents, and claims that, when she arrived at the meeting, she placed the additional papers she carried with her on top of the budget and that the budget remained hidden from view during the entire meeting.

At the meeting, employees discussed the need for a union and the changes they would like to see regarding wages, benefits, etc. Abrakian does recall telling one of the union representatives at the meeting, Tanya Mahn, that she had a copy of the Respondent's budget with her and expressing her belief that funds were being misappropriated, but that Mahn said she did not want to see it. (Tr. 466–471.) At some point during the meeting, Lashbrook and most of the employees signed authorization cards for the Union. (GC Exh. 6.) She and other employees also picked up some union stickers which they placed on their vehicles following the meeting which ended around 1 p.m.

[9] Foran had not been permitted to drive the Company van since January 24, due to a DUI violation. (Tr. 278.)

Lashbrook and Foran both testified, without contradiction, that, after the union meeting, they drove back to Morowske Home in Lashbrook's car where Lashbrook's mother was waiting to accompany Lashbrook to the bank. Lashbrook and her mother drove to the bank in the latter's car and, after taking care of the banking business, drove back to Morowske Home so Lashbrook could retrieve her car.

Following the meeting, Abrakian drove Schwark to work. Abrakian worked the afternoon shift on April 4, and was the one who picked up and returned Dugal and the other residents from the clubhouse to the Morowske Home later that afternoon. She testified that she and Romain were the ones who prepared lunch for the residents that day. She further recalls that after returning to Morowske Home, she worked the afternoon shift with Romain and that, at one point as they were preparing meals, Romain asked her how the union meeting had gone, and that she answered it had gone fine. Abrakian had not previously told Romain about the meeting. (Tr. 475.) Romain was not asked about, and consequently did not deny, Abrakian's testimony in this regard. Accordingly, I credit Abrakian's above testimony.

Lashbrook testified that on arriving at the Morowske Home, she had a conversation with Romain initiated by the latter. She claims that after asking her about her banking problems, Romain asked Lashbrook if she had attended the union meeting earlier that day. Lashbrook did not recall having previously told Romain about the meeting. When Lashbrook replied that she had, Romain stated that he did not think the Union was a good idea. Lashbrook, who characterized her relationship with Romain as somewhat friendly, commented that she was all for the Union. Romain then told Lashbrook that his father or uncle hated the union, that despite paying money the union was not doing anything for them, and that they wanted to get rid of the union but were having trouble doing so. Lashbrook remarked that she had no problem with that. Romain went on to say that he was telling her this so that she would understand that she was not going to get anything from the Union, and that she should not expect a raise simply because the Union was around. Lashbrook replied that it can't get any worse than what it already was, and that Romain was alone in his views because everyone wanted the Union. Romain responded that employee Randi Schwark was not sure about it. Romain then told Lashbrook that he was worried, and that she should be careful. (Tr. 105.)

Romain recalled having a conversation with Lashbrook about the Union sometime in April. He testified, however, that it occurred while they were both on break on the porch of the Morowske Home, and that it was Lashbrook, not he, who initiated the discussion. According to Romain, Lashbrook began the conversation by asking him what he thought of the Union and how it worked, and whether he thought it would be good for the Company. Romain purportedly told Lashbrook that he had discussed the Union with his father, that his father explained he had not had good experiences with the Union, and that there were pros and cons to having a union. The conversation, he contends, ended at that point. Romain denied knowing what precipitated this particular conversation with Lashbrook, and denies having any further conversations with her about the

Union, including presumably the April 10 or 11 phone conversation Lashbrook claims she had with Romain about telling employees they could be fired for supporting the Union. (Tr. 1404–1405.)

Prior to this April 4 conversation with Lashbrook, Romain, in late March or the beginning of April, had union-related discussions with other employees. Foran, for example, testified that in late March, before employees began expressing any interest in a union, Romain approached her and remarked that he didn't know why Foran wanted to have a union come in because it wouldn't do the employees any good. (Tr. 266.) Foran admitted to having previously told Romain, about a year earlier, of her interest in having a union. In response to Romain's query, Foran stated that a union would be good for the employees working there, and would be good for employees even if she were no longer employed at the facility.[10]

Romain recalled having a conversation with Foran about the Union, but claims it occurred sometime in April, and was initiated by Foran as they drove together in the Morowske van. He testified that Foran commented that she wanted to make a better place at Morowske for the next people that came to work there. Romain claims he simply told Foran that that was a nice way to look at it, and that the conversation ended at that point. (Tr. 1401.) Romain's version makes little sense. From his limited version of what Foran purportedly said to him, it is difficult to see how Romain would have understood what Foran was referring to. One might reasonably have expected Romain to ask Foran what she meant by her remark or seek some clarification as to its meaning, for while Romain testified that Foran was referring to a union, I fail to see how he could have gleaned as much from his description of what Foran said to him. His alleged response to Foran, that what the latter had said was a "nice way to look at it," makes even less sense. I found Romain's version of his conversation with Foran unconvincing and credit Foran over Romain.

Bibbee testified that, in late March, while she, Hibbs, Gevedon, and Romain were engaged in casual conversation either in the sitting room or the med room at Morowske Home, Romain remarked that if the Company found out they were for a union, they could be terminated. (Tr. 411.) Bibbee did not respond to Romain's comment. Hibbs similarly testified to being in the Morowske kitchen late one evening in March while Bibbee, Gevedon, and Romain were present, and commenting that it was not a good idea that employees didn't get raises or any holiday pay or other perks. Romain, she recalls, responded that the company would try to mess with, or fire them. Hibbs also claims to have had another conversation with Romain about the Union a few days later on the back patio of the Morowske Home. She testified that Romain initiated this conversation by asking how she felt about the Union, and that she replied that it was a good idea. Romain then told her that he and his father had discussed the Union, and that his father expressed the view that the Union would not be able to help the employees because the Respondent was not a big organization. (Tr. 527–528.)

[10] Romain's March inquiry into Foran's interest in a union is not alleged as a violation in the complaint.

Romain denied having any discussion with Bibbee about the Union, but claims to have heard Bibbee say that "everybody better be careful with their jobs so they don't get fired due to the Union." Bibbee made this comment, he contends, sometime in April in the Morowske kitchen. He claimed at the hearing that he did not respond to Bibbee's comment and simply walked away. However, in an affidavit he gave to the Board prior to the hearing, and shown to him during cross-examination, Romain admitted he responded to Bibbee's comment by stating that his father had said the Union would not be a good idea. Romain denied ever asking Hibbs how she felt about the Union, saying that she could be fired for joining a union, or stating that the Company would "mess with them" if it found out employees were interested in a union. (Tr. 1403; 1416; 1431.) I credit Bibbee and Hibbs over Romain. From a demeanor standpoint, Romain came across as insincere and as less than candid in his description of events. His long pauses before responding to questions, particularly during cross-examination, reflected a certain insecurity and unwillingness on his part to give the answer required to the questions posed to him. In sum, I found Romain not to be particularly credible.

Following their conversations with Romain, Bibbee and Hibbs each separately called and asked Haack if they could be fired for supporting the Union. Bibbee recalls Haack saying that she did not know but did not think so, while Hibbs recalls Haack assuring her she could not be fired. According to Hibbs, Haack then posted a short note on the Company bulletin board stating that no one could be fired for supporting the Union. (Tr. 529.)

Bibbee's and Hibbs' above accounts, that they called Haack for advice were corroborated by Haack. Thus, Haack testified that both called her on separate occasions on April 8, to ask if they could be fired for joining a union, mentioning that Romain had conveyed this to them. Haack recalls telling Bibbee that she did not know and that Bibbee should ask Lashbrook about it. Haack, however, told Hibbs that she was not going to lose her job. Haack contends that following her phone conversations with Bibbee and Hibbs, she called Romain and told him that he should not be telling people that they could be fired for joining a union, that what employees did was really "none of our business," and that "we needed to just stay out of it and let them do what they needed to do." Romain, she further contends, denied making such comments to Bibbee or Hibbs. (Tr. 116.) Romain was not asked about, and consequently did not deny, being told by Haack to refrain from telling employees they could be fired for joining a union, and not to get involved in the employees' organizational activities.

In response to Bibbee's and Hibb's concerns, Haack, on April 9, posted a notice on the Morowske Home bulletin board notifying employees that they could not be fired for trying to start a union. (Tr. 613.) She contends the posting remained for 1 or 2 days after which it was taken down. She denied removing the posting or knowing who might have done so.

B. The Alleged Employee Complaints

Davis testified that for weeks prior to April 14, employees had been expressing concerns and complaining to her about policies and procedures not being followed at the Morowske

Home. As more fully discussed below, an employee meeting to address these concerns was held on April 14. According to Davis, these complaints came in the form of phone calls to her, and in written form, and included allegations that Haack was not at the Home during various times of the day, that she showed favoritism to certain staff members, that a staff member was babysitting for the supervisor and receiving favors in return, that Haack was fudging the timesheet and signing people in and out, that staff members were getting paid for not being in attendance at the Home, and that the Morowske van was being used for personal business. Regarding the personal use of the van, Davis testified to receiving phone calls stating that the van was seen at a Wal-Mart, and that the Morowske consumers were all standing outside the Wal-Mart with no staff around, and that the van had been seen at another location when consumers were supposed to be at a doctor's appointment. (Tr. 1462–1463.) Davis, however, could not recall who reported these two incidents to her, or when she purportedly received these reports.

Davis also testified to receiving a phone call from Schwark reporting that she had seen the Morowske van at the April 4 union meeting, and that Romain reported to her that Schwark told him she had seen the van at that meeting. Davis had no recollection of when she actually received these reports from Schwark and Romain. However, if these reports to Davis by Schwark and Romain were in fact made, presumably they would have occurred on or after the April 4 union meeting, and no later than April 8, since both Davis and Pettyplace claimed to have discussed this alleged incident at a meeting held between them on April 8. Davis testified that on receipt of Schwark's phone call, she notified Pettyplace about the van being seen at a union meeting. Davis could not recall when she may have notified Pettyplace, and stated only that it would have occurred "promptly" after her conversation with Schwark.[11] She contends that what concerned her about Schwark's report was not that the van was at a union meeting, but rather "that there were no consumers in the van." (Tr. 1475; 1557.) Davis claims that she asked Schwark to prepare a written statement setting forth her concerns and observations, and that Schwark did so. The written statement allegedly prepared by Schwark was received into evidence as General Counsel Exhibit 33.[12] Not only was Davis unable to say when she purportedly received General Counsel Exhibit 33, she was likewise unable to recall when she allegedly received written reports from Romain and Hibbs, stating, as she initially did regarding General Counsel Exhibit 33, that she did not recall if they were given to her before or after the April 14 employee meeting. (Tr. 1461; 1554–1557; 1572; 1596.)

Davis testified that she began looking into these complaints and kept Pettyplace abreast of her investigation. She claimed that, during her investigation, she learned from Haack, presumably sometime after April 4, that Dugal was taken to the doctor on April 4, by Lashbrook and Foran for an earache and stomach ailment. Davis, however, had no recollection when she might have been told this by Haack, that is, whether Haack told her before or after the April 14 employee interviews. It is not clear, therefore, if Haack's information about this alleged April 4 doctor's visit was what prompted Davis to look into the visit itself. Obviously, if she obtained the information from Haack after the April 14 interviews, then that information from Haack could not have been what prompted Davis to look into the April 4 doctor's visit. Davis does contend that on April 6, she asked Lashbrook about the doctor's visit, and that Lashbrook told her she and Foran had taken Dugal to the doctor on April 4, and that Dugal had been prescribed some Senokot for his bowel problem. Lashbrook, however, denied saying any such thing to Davis. The parties stipulated at the hearing that Dugal was, in fact, not taken to the doctor on April 4.

Davis nevertheless claims that based on the above information, she reviewed the documents that would normally be associated with a doctor's visit, and became suspicious about the alleged April 4 doctor's visit. Thus, on reviewing the health care chronological where doctors' visit were generally recorded, she found a notation for an April 4 doctor's visit, but noticed that the date "April 4," appeared to have been squeezed

[11] Pettyplace claims she first learned of the employees' interest in the Union when Davis told her about the van being spotted at a union meeting. (Tr. 800.) Although it is clear from Pettyplace's above assertion, and from her own testimony, that Davis must have known or purportedly been made aware of by Schwark of the employees' organizational activity at some point prior to her April 8 meeting with Pettyplace, in a sworn affidavit she gave to the Board prior to the hearing, Davis, untruthfully in my view, averred that she first learned of such activity on April 14.

[12] GC Exh. 33 is a 3-page handwritten statement dated "April 11, 2005," presumably the date it was prepared, with a signature at the bottom of the third page purporting to be that of Randi Schwark. Although Davis claims to have received it from Schwark, she could not recall if she received GC Exh. 33 before or after April 14, the date employees were subjected to individual interviews. Even when shown the letter by Respondent's counsel, Davis was unable to say when, or for that matter how, she received it, e.g., by fax, mail, in person, etc. Indeed, she had no recollection of having shared it with anyone, or shown it to any other management official. While she adhered to this "unable to recall" position regarding GC Exh. 33 on cross-examination by the General Counsel, on direct examination, in somewhat of an epiphanic moment, Davis finally claimed to have received GC Exh. 33 before the April 14, interviews. Her testimony regarding GC Exh. 33 was ambiguous, vague, and not at all credible. Thus, her claim on redirect examination of having received GC Exh. 33 from Schwark before the April 14 interviews is not worthy of belief, and was, in my view, nothing more than a fabrication designed to bolster the Respondent's subsequent explanations for discharging Lashbrook and Foran. The one person who could have authenticated GC Exh. 33 and explained the circumstances surrounding its preparation, and how and when it was given to Davis, was Schwark herself. Schwark, however, was not called as a witness, despite assurances by Respondent's counsel during his opening remarks that he would be calling her to testify. The Respondent's failure to call Schwark to authenticate GC Exh. 33, particularly in light of Davis' poor testimony regarding the exhibit, casts doubt on the reliability and trustworthiness of GC Exh. 33, and further supports an adverse inference that if called to testify, Schwark would not have authenticated GC Exh. 33 as her work product or given testimony supportive of the Respondent's case. The reliability of GC Exh. 33 as a document prepared by Schwark is further undermined by the fact that the signature on GC Exh. 33, purporting to be Schwark's, differs substantially from Schwark's actual signature found on other Company documents. (See, for example, Schwark's signature on GC Exhs. 2, 19, and R Exh. 4.)

in between other dates as if it had been inserted after the fact to reflect that such a visit occurred. (See GC Exh. 4.) The manner in which the date entry was made, according to Davis, seemed out of place and not consistent with the other entries. She claims she also looked for a physician's order or script to see if Dugal had been prescribed some medication as a result of the April 4 visit, but found none. She likewise found no entry on the "med" sheet for April 4, but did find that an entry for "Senokot" had been made pursuant to another visit by Dugal to the doctor on April 7. Davis purportedly also reviewed the van log to see if a trip to the doctor had been made on April 4. The van log did contain an entry showing a purported trip to the doctor that day. (See GC Exh. 3.) She claims, however, that when she reviewed the communications and staff logs (R. Exh. 26), which would normally show that a doctor's visit had been scheduled for April 4, she found they contained no such entries.

According to Davis, if, as she purportedly was told by Lashbrook, Dugal received the medication Senokot during the alleged April 4 visit, then an entry for the Senokot medication should have been recorded in the medical log, and there should have been a doctor's script showing that Dugal was prescribed Senokot during the April 4 visit. She claims that following her discussion with Lashbrook, she searched the medicine cabinet for the Senokot and, on not finding any, discussed it with Haack and recommended that Lashbrook be written up for not following proper procedure. Lashbrook was indeed issued a write-up by Haack on April 7, which Lashbrook signed on April 8, for failing to record the Senokot medication in the medication book which, according to the write-up, Dugal allegedly received on April 4. (See R. Exh. 30.)[13]

As to the write-up she received from Haack on Davis' instructions, Lashbrook testified that she was not at work on April 7, but did sign it the following day, April 8, because, as medical coordinator, she was the one responsible for ensuring that such entries are made. She claimed that Haack was simply following Davis' directive to issue her a write-up and did not know why she was asked to do so. She further contends that on learning that she (Lashbrook) had not worked on April 7, Haack unsuccessfully sought to contact Davis for explanation. Lashbrook contends that she did not pursue the matter because the write-up was never actually placed in her personnel file. (Tr. 245; 248.)

Davis contends that as part of her investigation into the April 4 doctor's visit, she called the doctor's office and was told by the receptionist that the doctor was not in on that date and that no such visit occurred. Davis had no recollection of when she made those calls to the doctor's office.[14] She further claims to have gone to the friendship house and spoken with the director who reviewed the sign-in sheet and confirmed that Dugal had arrived and signed in at the facility at 10 a.m. on April 4, the time when Dugal purportedly was at the doctor's office. Davis purportedly also received a copy of the friendship house sign-in sheet. (See R. Exh. 10.) Davis, however, could not recall when she had this conversation with the director at friendship house, explaining only that it occurred before Lashbrook and Foran were fired on April 25, nor did she recall when she first saw Respondent Exhibit 10. (Tr. 1560.) Davis contends that on April 8, she met with Pettyplace to discuss her investigation, and that, following that meeting, she continued her investigation by double-checking the documents she had earlier reviewed, calling the doctor's office one more time to confirm that no visit occurred on April 4, and by asking employees if they knew whether or not such a visit had taken place. She recalls asking Schwark what she knew about the visit but Schwark purportedly had no information to give her. Based on her review of the above-described documents and discussions with the doctor's office, Davis concluded that there had been no doctor's visit on April 4.

C. The Events of April 8

On the morning of April 8, Davis met with Pettyplace at the latter's office to discuss the progress of Davis' investigation into employee complaints. Davis claims that at this meeting, she provided Pettyplace with the documents she obtained during her investigation, including the written statements she had obtained from employees. Davis recalls that at one point during the meeting, Pettyplace phoned Haack to discuss several matters, including the amount of overtime being worked at Morowske Home. Davis claims she was able to hear what Haack was saying to Pettyplace during that phone conversation because Pettyplace placed the call on speakerphone. She recalls Pettyplace asking Haack to fax her copies of various documents, including the health care chronologicals, the van logs, and consultation referral forms so that she could determine if the overtime was justified. At the hearing, Davis identified Respondent Exhibit 31 as the set of documents Haack faxed to Pettyplace that day. According to Davis, at one point during their phone conversation, Pettyplace asked Haack if Dugal was seen by a doctor on April 4, and Haack answered that Dugal "must have went [sic] to the doctor," that Lashbrook and Foran took him to the appointment, and that she didn't do so because she was busy at a meeting. (Tr. 1481.) After some discussion with Haack about the doctor's appointment and being told by Haack that she knew little of what had gone, Pettyplace, according to Davis, commented that Haack did not even know where the van was on that day. (Tr. 1481; 1486.) Davis testified that after she and Pettyplace reviewed the faxed documents they had gotten from Haack, they agreed to hold a meeting with employees on April 14, to fully look into the employee com-

[13] As there was no doctor's appointment for Dugal on April 4, the assertion in the write-up that Dugal received a sample packet of Senokot on April 4, was incorrect. Despite only cautioning Lashbrook in the write-up that "any further violations" might affect her employment, Pettyplace cited this write-up as a reason for Lashbrook's eventual discharge on April 25. (Tr. 716.)

[14] The Respondent at the start of the hearing promised to call the doctor's representative as a witness to confirm that there was no April 4 visit by Dugal. The representative, however, was never called, presumably because the parties were able to stipulate that no such visit occurred that day. Yet, Davis' claim of having called the doctor's office to confirm whether or not Dugal was seen that day and to have spoken with the doctor's receptionist, was unsubstantiated, and the information allegedly provided to her by the receptionist pure hearsay. Further, I find it odd that Davis would not have obtained a written statement from the receptionist, who was willing to provide one, confirming the substance of their conversation.

plaints. Pettyplace, according to Davis, then called Prevatt "and gave her some information" as to the employee meeting. Davis subsequently instructed Haack by phone to notify the Morowske staff of the meeting.

Pettyplace provided the following account of her April 8, meeting with Davis. Davis came to see her that day to discuss the employee complaints, and to provide her with various documents which Davis purportedly obtained in the course of her investigation into the employee complaints. Davis also told Pettyplace of the report she had received about the Company van having been seen at a union meeting on April 4, and about Abrakian having had a copy of the budget with her at that meeting. Pettyplace could not recall when she first learned of the van being spotted at the union meeting, claiming initially that Davis told her during their April 8 meeting, but stating, on cross-examination, that she was not sure when she first learned of it. Although she believes Davis identified the individual who had given her the report about the van, Pettyplace was unable to recall or name the individual. (Tr. 995.) Pettyplace contends she instructed Davis to ask Schwark to provide a written statement about seeing the van at a union meeting, and that Schwark in fact did so in the form of General Counsel Exhibit 33.

Pettyplace's testimony on when she first saw General Counsel Exhibit 33 was confusing and seemingly contradictory. Thus, on direct examination, Pettyplace identified General Counsel Exhibit 33 as one of the documents she and Davis reviewed and discussed in deciding whether or not to hold a meeting among Morowske Home employees. (Tr. 846.) Both Davis and Pettyplace agree that the decision to conduct an employee meeting on April 14, was made during their April 8 meeting. Consequently, if Pettyplace is to be believed, then she and Davis first saw and discussed General Counsel Exhibit 33 on April 8. General Counsel Exhibit 33, however, is dated April 11. Although Schwark was not called to authenticate the document as her own or to confirm when it was prepared, a reasonable inference is that it was prepared on the date shown therein, e.g., April 11, 3 days after Pettyplace implicitly claimed she and Davis had reviewed and discussed it. However, on cross-examination, Pettyplace, apparently recognizing the inconsistency between her testimony that Davis showed her General Counsel Exhibit 33 on April 8, and the April 11 date on General Counsel Exhibit 33, altered her testimony and admitted that she, in fact, did not see General Counsel Exhibit 33 until April 15, when she returned from a 3-day trip to Arizona. She nevertheless testified that while in Arizona, she had Davis read the contents of General Counsel Exhibit 33 to her over the phone.[15] Davis, however, made no mention in her testimony of ever having read General Counsel Exhibit 33 to Pettyplace, and, in fact, had no recollection of reading or showing General Counsel Exhibit 33 to any management official, which presumably includes Pettyplace. Pettyplace's testimony regarding General Counsel Exhibit 33 struck me as fully contrived and not particularly credible.

As to her phone conversation with Haack, Pettyplace gave the following account. She testified that she called Haack because Davis had reported to her that the Morowske van was seen offsite on April 4, at a union meeting. Pettyplace claims that when she asked Haack "if she knew where her van was on April 4," Haack replied that "the staff had taken the consumer, Daniel Dugal, to the doctor that day, that morning, then they took him to the clubhouse." Pettyplace claims that she probed Haack further about her latter response by asking Haack if she was certain the van had only gone to the doctor and the clubhouse that day, reiterating that the van had been spotted at a union meeting. Haack, she contends, became angry at that point and told Pettyplace that she cannot be expected to know where the van is every minute of the day. Pettyplace responded that as the person in charge at the Morowske Home, she was responsible for the van, and again asked Haack if she knew anything about the van being used to take staff to a union meeting. Haack answered no. Although unclear from Pettyplace's account, at some point either before or during this exchange, Pettyplace asked Haack to fax her the Morowske van log and the health care chronological for all the consumers, and any documents confirming Dugal's visit to the doctor on April 4. Pettyplace contends that shortly thereafter, she received a fax from Haack containing all the documents which make up Respondent Exhibit 31.[16] (Tr. 848; 851; 999.) As to the consultation referral form found on the last page of Respondent Exhibit 31, Pettyplace testified that she received it as is from Haack, e.g., with both the top and bottom halves of the form filled in. According to Pettyplace, this was the only phone conversation she had with Haack in which the Union was discussed.

Haack provided a much different version of her April 8, phone conversation with Pettyplace. Thus, she testified that Pettyplace called her that day to tell her that the van had been spotted at a union meeting on Van Dyke and Thirteen Mile Road at 11 a.m. on April 4, and then instructed her to let the "staff know that, if they were participating in the union involving the company time at all, they would be terminated." (Tr. 614.) Haack recalled asking Pettyplace if she wanted her instructions written down on the communication log for employees to read, but that Pettyplace answered, "No." Pettyplace, Haack contends, went on to say that "the union could not do anything for the staff at Morowske, they would not get raises . . . they would not get benefits, and that politicians up north were trying to stop the direct care workers from unionizing," and further commented that employees at Central State, another of Pettyplace's companies, were trying to get rid of the Union.

[15] Pettyplace was inconsistent regarding her return date from Arizona for she subsequently admitted that she was not sure if she returned from her Arizona trip on Friday, April 15, or Saturday, April 16, or whether she remained in Arizona throughout the weekend. (Tr. 986; 1019.) Pettyplace did offer to clarify this ambiguity by pointing out that a review of her appointment book might help clarify the matter. Neither party, however, accepted her offer to review her appointment book. As her inability to recall this particular event could adversely affect her credibility, one would reasonably have expected the Respondent to take Pettyplace up on her offer. Its failure to do so leads me to suspect that production of the appointment book would not have benefited the Respondent's case.

[16] According to Pettyplace and Davis, Haack initially faxed only some handwritten summaries, but subsequently, after being told by Pettyplace to do so, faxed the actual documents comprising R. Exh. 31.

Haack responded that this was simply Pettyplace's opinion. (Tr. 615.) At one point during their conversation, Pettyplace asked Haack to fax certain documents over to her. With the exception of the last document attached to Respondent Exhibit 31, a "Consultation Referral" form, Haack identified the other documents in that exhibit as the ones she faxed to Pettyplace on April 8. However, as to the consultation referral form attached to Respondent Exhibit 31, Haack insisted that the one she faxed to Pettyplace that day had only the top half filled in, but that the bottom half of the form which the attending physician fills in, was blank except for the initials "NS" written on it.[17]

The General Counsel at the hearing produced the original consultation referral form, received into evidence as General Counsel Exhibit 38, which Haack testified as being identical to the one she faxed, along with the other documents in Respondent Exhibit 31, to Pettyplace on April 8.[18] When shown General Counsel Exhibit 38, Pettyplace expressed "shock" and "surprise" on learning that another (original) version of the consultation referral form existed, and wondered aloud where General Counsel Exhibit 38 had come from. (Tr. 859.) Although she had no explanation for this discrepancy between what she claimed she received from Haack, and what Haack claims she faxed to her on April 8, Pettyplace nevertheless gratuitously speculated that Haack must have mistakenly run two documents through the fax machine simultaneously, causing the filled-in bottom half of the consultation referral form to be inadvertently transmitted along a similar one containing a blank bottom half. (Tr. 863.) Pettyplace's willingness to engage in such speculation, and to, at times, ramble on and volunteer information not asked of her, served only to further undermine her credibility. (See, e.g., Tr. 870–871; 899; 910; 912.)

Haack testified that this April 8 phone call from Pettyplace was one of several she received from Pettyplace that same week. She recalled that during one of these other calls from Pettyplace, Lashbrook was with her in her office. Pettyplace, she contends, told her during this conversation that she wanted Foran removed from the medical coordinator's position, that the employees' work hours should be reduced to 32 hours per week, and that there were to be only two staff persons working a shift, with Haack being one of the two. Haack admits that Pettyplace upset her during that conversation, and that, following the phone call, Lashbrook asked her what was wrong. Haack told Lashbrook that this was the third time in a week that Pettyplace had called her and that she seemed angry every time she called. Lashbrook then explained that Pettyplace was angry because employees were trying to organize a union at Morowske Home. (Tr. 609.)

Lashbrook corroborated Haack's testimony regarding the phone conversation the latter had with Pettyplace during which Lashbrook was present. According to Lashbrook, based on the comments and responses Haack gave to Pettyplace during that phone conversation, she surmised that the Union was being discussed. Lashbrook, for example, recalled hearing Haack tell Pettyplace that she knew nothing about "a meeting," and that "they didn't take the van, it was here." There was also some discussion between Haack and Pettyplace about overtime during that conversation. At one point, Lashbrook heard Haack refuse to do something Pettyplace asked her to do, offering instead to write down whatever Pettyplace was asking her to do in the staff log. Following the phone call, Haack explained to her that Pettyplace wanted her to tell employees that "they could be terminated if they practiced union business," that she had refused to do so and had, instead, offered to write the directive down on the staff log for employees to see, and that Pettyplace declined the suggestion. Following the conversation, Lashbrook, noticing that Haack seemed upset, revealed to Haack that Pettyplace may have been angry because of the union meeting that was held on April 4. She cautioned Haack that, based on her own experiences, the Respondent was now going to start harassing Haack, and told Haack to watch out for herself. According to Lashbrook, Haack mentioned to her on at least two other occasions that Pettyplace had called her at other times to discuss the Union.

Following the April 8 Pettyplace-Davis meeting, Prevatt was asked by Pettyplace to assist Davis in the investigation. According to Prevatt, Pettyplace wanted her and Davis "to look into concerns that some employees had about other employees at Morowske House and to get to the truth regarding those concerns." (Tr. 1169.) Pettyplace testified that she asked Davis to conduct the investigation because she was Respondent's program coordinator, and that Prevatt was asked to participate as a witness, explaining that she generally has two management persons taking part in the investigation, and that, more often than not, one of the investigators will do the talking while the other takes notes. She contends that she had faith in Prevatt's ability to conduct a fair and honest investigation because Prevatt had conducted similar investigations in the past, was very thorough, and knew the legal boundaries. (Tr. 958.)

Later that day, the Union faxed to Pettyplace a letter notifying her that a majority of the Respondent's direct care workers had selected it to represent them for collective-bargaining purposes, and asking for recognition. (See GC Exh. 22.) On cross-examination, Pettyplace claimed to have no recollection

[17] The "Consultation Referral" form has a top and a bottom section separated by double-dotted lines and is used when a resident is to be seen by a doctor. The top section of the form is used to identify the reason for the medical consultation, the medications the resident is currently receiving and any known allergies, and is dated and signed by the employee filling out the form. The bottom half of the form bears the heading "TO BE COMPLETED BY DOCTOR" and apparently gets filled in by the doctor who sees the resident. The section lists the doctor's findings, diagnosis, and recommendations, and contains the date of the visit and the doctor's signature.

[18] Haack testified that, unlike the "Consultation Referral" appended to R. Exh. 31, the one she faxed to Pettyplace on April 8, did not have the bottom half, e.g., the doctor's section, filled in but rather was blank, except for the initials of Nancy Sammut, who was the Morowske Home nurse at the time, on the bottom of the form indicating it had been reviewed by Sammut. (Tr. 691.) The documents identified by Pettyplace and Davis as the ones faxed to them by Haack on April 8, were received into evidence as R. Exh. 31. The disputed document is the last page of R. Exh. 31, entitled "Consultation Referral." Haack claims that the bottom half of the "Consultation Referral" form, just below the double-dotted line, and containing the heading, "TO BE COMPLETED BY DOCTOR" was not filled in when she faxed it to Pettyplace on April 8. Pettyplace and Davis, on the other hand, insist that the "Consultation Referral" attached to R. Exh. 31, was received as is from Haack, e.g., with the bottom half filled in.

of having received or even seen the Union's letter. A fax transmission entry on the top of General Counsel Exhibit 22 reflects that it was faxed to Pettyplace at 2:51 p.m. on April 8. Pettyplace did recall that also on April 8, she phoned her attorney, Greg Bator, to notify him that the Company van had been seen at a union meeting, but did not recall ever discussing the Union's recognition demand letter with him. Pettyplace's claimed inability to recall receiving or seeing the Union's April 8 recognition demand letter or having discussed such a demand with her attorney rings hollow. I find it somewhat incredulous that Pettyplace, who has received training in labor relations matters, and who acknowledged the importance of the Union's demand for recognition in the conduct of her operations, would recall calling her attorney to inform him about a rumor that the van had been seen at a union meeting, but not recall informing him of the Union's claimed majority status or to seek advice on what to do regarding the Union's demand for recognition.

Following the April 8 meeting, Prevatt and Davis purportedly met to arrange when and how the employee meeting was to be conducted. Prevatt claims she reviewed Dugal's health care chronological and the van log that Davis provided to her before the April 14 meeting. She further recalls Pettyplace and Davis telling her sometime before the April 14 employee meeting that the van had been seen at a union meeting, and learning that the Company budget being removed by Abrakian from the Morowske Home. Based on her discussions with Davis, Prevatt prepared a list of the concerns that had to be addressed, as well as a different set of questions that were to be asked of employees and supervisors during the interviews.

D. The April 14, Employee Meeting

1. The pre-interview conduct

The record reflects that Davis informed Haack that a mandatory employee meeting was to be held on April 14, and instructed her to notify employees of the meeting. Haack apparently did so within days of the meeting. As required, on April 14, employees gathered at the Morowske Home for the mandatory meeting to be conducted by Prevatt and Davis. As the Morowske Home was normally staffed by 2–3 direct care workers per shift, some of the employees who attended the mandatory meeting were not scheduled to work during the time the interviews were to be conducted and were there solely for the meeting. According to Davis, on arriving at Morowske Home on April 14, she and Prevatt told employees they were there to investigate certain allegations, and that Prevatt told employees they were to sit and watch a video on blood-born pathogens and engage in no "sidebar" conversations with each other as they waited to be interviewed separately. Davis recalls Lashbrook saying aloud to employees that they did not have to tell Davis or Prevatt anything about the union, and Prevatt replying that they were not there to talk about the Union. (1525.)

Prevatt testified that on arriving at Morowske Home for the employee meeting, Davis introduced her to the waiting employees, told them about the video they were expected to watch as each was being interviewed, and that they were not to engage in any discussion among themselves about the investigation. She contends that she instructed Haack and Romain to watch the group to ensure that no such discussions about the investigation took place. (Tr. 1187.) Lashbrook, she recalls, then stood up and told employees they did not have to answer any questions about the Union, and that she (Prevatt) then told employees that there was to be no "sidebar" conversations. Prevatt admits she did not explain to employees what she meant by "sidebar" conversations. Asked if employees were prohibited from engaging in any other type of conversation unrelated to the investigation, Prevatt stated they were not, and that she only wanted them to refrain from discussing or speculating about the investigation. Thus, she claimed that employees were free to discuss other matters, including the video, family matter, etc. (Tr. 1188.) Her testimony in this regard, however, squarely conflicts with a statement made by her in a sworn prehearing affidavit given to the Board, wherein she recalled telling employees that "there should be no sidebar conversations or *nonwork-related conversations* while I was conducting the investigation." (Tr. 1357.)

Haack testified that at the April 14 employee meeting, Davis appeared with Prevatt and that Romain and an assistant manager from Lillian House, Eva Hemphill, were also present for management. Davis introduced Prevatt to the employee group and then had the employees identify themselves. Haack recalls that either Davis or Prevatt then told employees "there was going to be an investigation and we were not to talk to anybody about the investigation and they would be taking us into my office one-by-one and interviewing us, and we would watch a blood borne pathogen tape while they were doing that." She further recalled either Davis or Prevatt instructing employees that "they were not to talk about anything. We were on company time. We were not to talk to each other, and that Eva Hemphill would be watching over us to make sure we didn't talk to each other." Prevatt, she contends also told employees that they were not allowed to discuss what transpired during their interviews with anyone. At one point, Lashbrook, she contends, told the group that they did not have to discuss anything about the Union with Prevatt and Davis, and that Prevatt responded by telling employees that "there would be no talk about the Union and if there was any talk about the Union, you'd be terminated. She further claims that she and Romain were instructed by Prevatt "not to let anyone talk to each other." (Tr. 618–620.)

Romain recalls being present for the April 14 meeting, and Prevatt introducing herself and instructing employees they were to sit and watch a video on blood-borne pathogens as they waited to be interviewed. At one point, Lashbrook, he contends, told employees that they did not have to say anything about the Union, to which Prevatt responded that there was to be no "closed-bar" conversations between employees. (Tr. 1409.)

In addition to Haack and Romain, several other employees testified as to what Davis and/or Prevatt told the employee group just prior to the individual interviews. Lashbrook recalled Davis saying that she was conducting an investigation, and that employees were all going to be called into the room individually but did not explain what the investigation was about. Davis, she contends, further told them they were not allowed to discuss the subject matter of the investigation with each other or anyone else outside the Home, nor were

they permitted to discuss *anything* with each other while we were sitting out in the living room waiting or we could be terminated. Lashbrook claims that when employees were asked if they had any questions, she stood up and told employees they did not have to answer any questions about the Union. In response, Prevatt, she contends, told employees that "there will be no more talking about a union or union business on company time in this Home or you will be terminated." (Tr. 119–120.)

Foran's recollection is that at the start of the meeting just before the interviews, Prevatt told employees that "this was an investigation, and we were going to be taken into Diane Haack's office one-by-one, and we were not to speak to each other or we would be terminated." Prevatt also told employees that they "were not to speak to each other" as they watched a video on blood pathogens, and that, after being interviewed, they were to leave immediately, unless we were working. Foran further recalled Lashbrook telling employees that they did not have to answer any questions about the Union, and Prevatt responding that "there'll be no more union talk on company time, or we could get terminated." (Tr. 305–306.)

Abrakian testified that Prevatt told employees they were "not to discuss the contents of the investigation with each other or anyone else or we would be terminated." On cross-examination, Abrakian noted that Prevatt's prohibition on speaking applied to all subject matters, not just the investigation itself. She also recalled Lashbrook telling employees they did not have to answer any questions about the Union, and Prevatt responding that the employees "were on IDA company time and from that point on, there was to be no discussion of union or union activity or we would be terminated." (Tr. 479; 502.)

Hibbs recalled Davis telling employees gathered for the April 14 meeting that they were to watch a video while other employees were being interviewed, "and that there was to be no side talking while this was going on or we could be terminated." Lashbrook then commented that employees did not have to answer any questions about the Union, to which, she contends, Prevatt responded that this "was to be the last statement about the union. There was to be no more discussion about the union or we could be terminated." (Tr. 531.)

Bibbee testified that Davis first addressed the group, telling them each employee was to be questioned individually, and that "they were not to discuss with each other what was talked about in our meeting." She recalled Lashbrook, at one point, telling employees that "we did not have to discuss the meeting with them," and Prevatt responding that "union talk would not be allowed on IDA's time." (Tr. 421–422.)

I am convinced, based on a composite of the employees' testimony, that Prevatt told employees just prior to the interviews that they were not to discuss any nonwork-related matters among themselves as they waited to be interviewed, and, in response to Lashbrook's comment that employees did not have to answer any questions about the Union, further told employees that they could be terminated if they engaged in any talk about the Union. Prevatt's claim that she simply told employees only that they were not to engage in any "sidebar" conversations is not credible, as it is contradicted by her own pretrial affidavit wherein she admits telling employees that they were prohibited from engaging in "sidebar" as well as other nonwork-related conversations. I also reject as not credible, and as inconsistent with the mutually corroborative testimony of several employee witnesses, that Prevatt did not threaten employees with discharge if they discussed the Union among themselves.

2. The individual employee interviews

After instructing employees, Prevatt and Davis summoned each employee into Haack's office to be interviewed.[19] Haack remained outside with the other employees while the interviews were conducted. Davis apparently took charge of calling in each employee, and Prevatt took the lead role in questioning employees. Prevatt testified that she had a list of questions she planned and did ask all employees during their interviews. Among the questions asked, according to Respondent Exhibit 7, was whether there was "anything [the Respondent] could do to improve the workplace or [the employees'] enjoyment on the job."[20]

Davis testified that even before the interviews, the Respondent suspected that Foran, Lashbrook, Haack, and Abrakian had violated Company policies. Foran, Davis explained, was suspected of theft, e.g., taking money out of the Company safe, and falsifying Company documents to reflect a doctor's appointment on April 4, that did not occur. Lashbrook was also suspected of falsifying Company documents and of using the Company van for personal use during work time, while Abrakian was suspected of stealing confidential information, to wit, the Company budget, and destroying it. (Tr. 1473–1474.) Prevatt likewise suspected prior to the interviews that Lashbrook and Foran had lied about taking Dugal to a doctor's appointment on April 4, and conceded that, on this particular subject matter, she had not kept an open mind when interviewing Lashbrook and Foran. (Tr. 1351.)

Prevatt and Davis, as well as several of the employees interviewed, testified as to what was asked, and what responses were given, during the April 14 interviews. There is disagreement between Prevatt and Davis on the one hand, and the employees on the other, as to what was asked, said, or discussed during these interviews. Unlike Prevatt, Davis was not ques-

[19] Notes of those interviews, purportedly taken by Prevatt and Davis, were received into evidence as R. Exhs. 7 and 32, respectively. For the reasons more fully discussed infra, there are too many discrepancies and inconsistencies regarding the preparation and contents of R. Exh. 7 to render it reliable and trustworthy. Accordingly, for the reasons discussed below, I give no weight to, and do not rely on, R. Exh. 7 in making my determinations here.

[20] In her prehearing affidavit, Prevatt denied asking employees during their interviews if there was anything she could do to improve their working conditions. Prevatt denied that there was an inconsistency between this latter denial in her affidavit, and the statement in R. Exh. 7 that she asked employees if anything could be done to improve their workplace or their enjoyment on the job. (Tr. 1367–1368.) The distinction Prevatt attempted to draw is without substance. I find she did indeed ask employees during their interviews what the Respondent could do to improve their working conditions.

tioned extensively, and provided only limited testimony, about the individual interviews.

According to handwritten notes taken by Davis of the April 14 interviews, employee Jenkins was the first to be interviewed, followed by employees Gevedon, Hibbs, Schwark, Romain, Lashbrook, Bibbee, Abrakian, and Foran in that order. As Jenkins, Gevedon, and Schwark did not testify, the only evidence of what they may have said during their interviews came from testimony provided by Prevatt and/or Davis, and from Respondent Exhibit 32, Davis' handwritten notes. The Respondent also relied on Respondent Exhibit 7 to bolster Prevatt's limited recollection of those interviews. The other named employees did testify.

a. Jenkins

Jenkins, as stated, did not testify. Davis' recollection of that interview is that Prevatt was the one who questioned Jenkins, and that Prevatt began the interview by asking Jenkins if there was anything going on at the Home that she should be aware of. According to Davis, Jenkins was upset and believed she was being treated in a discriminatory manner because other employees were receiving preferential treatment from Haack, e.g., by doing favors for them and letting them get away with things. Prevatt asked Jenkins about any gossip going on in the Home. Jenkins purportedly told Prevatt that employees were getting paid for not being at work. Prevatt, Davis contends, also asked Jenkins if employees were getting paid for overtime. Davis could not recall much more of the interview. (Tr. 1526, 1527.)

Prevatt's testimony as to how Jenkins' interview began was vague, confusing, and not wholly consistent with Davis' recollection. According to Prevatt, the interview began with Jenkins complaining about alleged discriminatory practices at the workplace. Prevatt was not sure how the subject first came up, whether Davis questioned her about it or whether Jenkins first brought up, but contends that Jenkins simply blurted out that she had been told by Romain and Gevedon about a remark Haack had made about not liking "to hire black girls because they were lazy." Prevatt claims that Jenkins directed her remarks to Davis, and that she did not know if Jenkins' comments were part of an ongoing discussion the two might previously have been having on the subject. (Tr. 1204.)

Because of the seriousness of the subject matter, Prevatt decided to add a question on discrimination at the workplace to the list of questions she intended to ask all other employees during their interviews. Prevatt claims she did question Jenkins about the medication procedures at Morowske Home, about the payroll process, and on whether she was being paid overtime. Jenkins, she contends, expressed concern about medication procedures not being followed, and about Haack bringing up the Union, and also described an instance in which her hours were recorded in such a manner on the payroll timesheet as to deny her overtime for 2 hours of overtime worked. According to Prevatt, during her interview, Jenkins "volunteered" seeing the notice posted by Haack stating that employees could not be fired for joining the Union. Prevatt did not recall asking Jenkins how she knew the notice had been posted by Haack, but claims that Jenkins was upset about the posting. Prevatt claims she also asked Jenkins about the van being driven for personal use, and that Jenkins purportedly told her about a voice mail Lashbrook had left for her saying that Haack had permitted Lashbrook to use the van to go to a meeting and asking Jenkins if she wanted to ride together to the meeting. (Tr. 1218; 1223; 1321.) According to Prevatt, Jenkins pulled out her cell phone during the interview and played back an inaudible recording of a voice message from Lashbrook to her confirming the above information about using the van to go to the meeting. Prevatt claims she disregarded and gave no weight to the recording because it was not very audible.

In her description of Jenkins' interview, Davis made no mention of this exchange. Although Davis recalled Jenkins talking about discrimination, Davis' recollection, as noted, was that Jenkins complained about Haack giving preferential treatment to some employees by doing favors for them and letting them get away with things. Davis made no mention of Jenkins blurting out anything at the start of her interview about hearing from others how Haack complained about not wanting to hire black women because they were lazy. Although Respondent Exhibit 7 makes reference to the comment attributed to Jenkins by Prevatt in her testimony, Respondent Exhibit 32, Davis' handwritten notes of the interviews which I find more reliable than Respondent Exhibit 7, makes no mention of any such remark being made by Jenkins during her interview. Had Jenkins made the rather crass remark about black women attributed to her by Prevatt, I seriously doubt Davis would have forgotten it. Further, Prevatt implicitly suggests in her description of Jenkins' interview that the latter simply volunteered the information right off the bat, to wit, even before being asked any questions. Davis, on the other hand, testified that it was Prevatt who began the interview by asking Jenkins if there was anything going on at the home that she should be aware of. Nor was any mention made by Davis in her testimony or in Respondent Exhibit 32 of Jenkins having played a voice message from her cell phone during the interview, as claimed by Prevatt.

b. Schwark

Schwark, as noted, was not called to testify, despite a representation by Respondent's counsel at the start of the hearing that he intended to do so. (Tr. 46.) According to Prevatt's description of the interview, Schwark volunteered information about a staff meeting during which Haack asked for an update regarding the Union, and about seeing a note posted by Haack advising employees they could not be terminated for joining a union. Schwark, Prevatt contends, was also asked about, and volunteered, information regarding the van's use for personal reasons on April 4. Schwark purportedly volunteered that the van had been at the union meeting on April 4, and about Lashbrook having asked Haack for permission to use the van. Prevatt contends that she did not question Schwark about the Union and that it was Schwark who "brought it up immediately" while responding to Prevatt's inquiry into whether the van had been used for personal reasons. (Tr. 1281.) As to Schwark's April 11 letter, Prevatt does not recall it being produced during Schwark's interview. She testified, however, that she was aware of its existence before the April 14 interviews,

and had surmised from its assertion therein that Lashbrook and Foran had attended the April 4 union meeting. (Tr. 1353.)

Davis provided little testimony regarding Schwark's interview. Relying on statements contained in a prehearing affidavit she gave the Board, Davis recalled Schwark and Jenkins for that matter, stating during their interviews that they did not want to participate in the Union, and Prevatt replying that they were not there to talk about the Union. While Davis could not recall what prompted Schwark and Jenkins to make their statements, her testimony does reveal that Schwark and Jenkins revealed to Prevatt and Davis during their interviews that they did not support the Union.

c. Hibbs

Hibbs testified her interview began around 2 p.m. and lasted some 30 minutes. She recalls Prevatt doing the questioning and Davis taking notes. During the interview, Prevatt, she contends, asked if she (Hibbs) was aware of any racial discrimination going on at the facility, if she knew of any employee who left work early while still on the clock, if she knew of a van being used for a meeting, and if she knew how her supervisors felt about the Union. Hibbs answered no to all of these questions. Prevatt further asked if she knew of the note that had been posted on the bulletin board about the Union. Hibbs denied to Prevatt knowing about it, but admitted at the hearing that she lied to Prevatt about seeing the posted note because she was frightened at the prospect of being fired for being involved in the Union. (Tr. 533.) Prevatt was not questioned on, or asked to recount, her interview of Hibbs. Accordingly, Hibbs' limited version of her April 14 interview is accepted as true.

d. Romain

Romain, the fourth one interviewed, recalled being asked by Prevatt questions about the medications being set up, and about the employee's sign-in and out procedure. He denied being asked if the Morowske van was being driven for personal use,[21] or any question pertaining to Dugal's alleged April 4 medical appointment. He also denied bringing to his interview, or being asked to provide Prevatt or Davis with, Company documents relating to the April 4 doctor's visit to the interviews. (Tr. 1411.)

Prevatt recalls asking Romain if he worked on April 4, who else worked that day, and if he happened to see Lashbrook's and Foran's vehicles parked at the Morowske Home. Romain, she contends, answered that he could not recall. She also asked if he knew who completed the health care chronologicals, and Romain purportedly replied that Lashbrook did so as she was the medical coordinator at the time. Prevatt recalls also asking him who had mentioned the Union during a recent staff meeting, and Romain replied he did not attend the meeting. She further asked if Romain knew what Haack's position was regarding the Union, and Romain allegedly replied that he avoided discussing the Union because he didn't want to hear about it. Prevatt admitted questioning Romain about a Union meeting during his interview, but denied asking any union-related questions of the other employees interviewed. (Tr. 1318–1319.) This latter claim by Prevatt, however, was, as noted, disputed by Hibbs, and, as shown below, by the other the employees who were interviewed and who testified in this proceeding.

Asked if Romain seemed to know about a doctor's appointment occurring on April 4, Prevatt stated that he did not seem surprised by the question. Romain, as noted, denied being asked any question about that alleged appointment. Although Romain further denied that he was asked to provide documents relating to that appointment, Prevatt's testimony on this matter was vague and confusing. At one point in her testimony, for example, she commented that Romain was "unable to produce the other things that I asked for, the physician's order and a number of things," and explained to her that "he didn't know where they were and that he hadn't seen them since." (Tr. 1213.) Her assertion in this regard strongly suggests that she had asked Romain during the interview to provide her with certain documents, and that he was unable to do so, a claim denied by Romain. On cross-examination, Prevatt was questioned about a statement in Respondent Exhibit 7 stating that Romain "provided documentation" during his interview, and claimed to recall that Romain brought with him the health care chronological and either the van log or the medical consultation form, a claim that Romain, as noted, denied. (Tr. 1209; 1411.) On further cross-examination by the General Counsel as to what documents Romain may have provided, Prevatt seemed confused and admitted that what had actually occurred was that Davis had asked Romain about certain documents, implicitly conceding that Romain had not in fact provided any documents during his interview. Prevatt claims she also asked Romain if he had seen the Morowske van in the parking lot of *the* meeting on April 4. (Tr. 1215.) She also asked Romain about the keys Foran had for parts of the facility, explaining that she did so because she knew that Romain had concerns about it. (Tr. 1317.)

I found Romain's testimony regarding his interview to be more reliable than that provided by Prevatt who, as previously indicated, had difficulty testifying without the aid of Respondent Exhibit 7. Prevatt's demeanor was not particularly convincing, and her poor recall and, at times, inconsistent statements, renders her testimony unreliable. For example, Prevatt, as noted, backed off her initial claim that Romain brought certain documents with him to the interview, even though Respondent Exhibit 7, her alleged notes of the interviews, contains a notation that Romain, during his interview, "provided documentation that Kelly [Lashbrook] and Linda [Foran] provided from 4/4 appointment." I accept Romain's assertion, eventually conceded to by Prevatt on cross-examination, that he was not asked, nor did he provide, any Company documents during his interview. I note in this regard that, unlike Respondent Exhibit 7, Davis' notes, Respondent Exhibit 32, contains no such claim, further rendering Respondent Exhibit 7 as unreliable and untrustworthy. I also reject as not credible and as inconsistent with the testimony of other employees who were interviewed and who testified at the hearing, Prevatt's claim

[21] Although there is some reference in R. Exh. 7 to suggest that Romain may have been asked this particular question, R. Exh. 7, as previously discussed, is not a reliable document, rendering the reference therein to what Romain may have said during his interview highly questionable.

that employees, unlike Romain, were not asked any union-related questions during their interviews.

e. Lashbrook

Lashbrook, the next one interviewed, gave a detailed account of her interview. She recalls being summoned for the interview at around 2:45 p.m. that day, and observing Davis taking notes, while Prevatt asked the questions. According to Lashbrook, Prevatt began the interview by asking her if she was aware that the Morowske van was seen at a union meeting on April 4, at 11 a.m. Lashbrook answered no, to which Prevatt replied that the van had indeed been spotted at the meeting. Lashbrook told Prevatt that the van had not been at any meeting she had attended, and denied Prevatt's query of whether she had ever used the van for nonwork-related matters. Prevatt next questioned Lashbrook on her activities for April 4, and Lashbrook proceeded to describe her work activities that day. She described for Prevatt her attempt to obtain a medical appointment for Dugal that day, and her unsuccessful efforts to get Dugal's April 7 physical exam moved up to April 4. She told Prevatt that she and Foran then took four of the Morowske residents to the clubhouse, that she had left work early that day, and that, after quitting work, she went to a union meeting. She denied ever telling Prevatt during the interview that she had taken Dugal to see the doctor on April 4, for an earache problem, or saying that she and Foran had stayed with Dugal in the examination the entire time during that alleged April 4 doctor's visit. Prevatt also asked Lashbrook if Dugal had been provided lunch on April 4, and Lashbrook answered that Dugal had brought a bag lunch that had been prepacked for him the night before. Lashbrook denied being shown by Prevatt or Davis during her interview any of the documents (e.g., the health care chronological, the van log, the medical consultation form, or medication forms) that she and/or Foran were alleged to have falsified or altered, or, for that matter, being told about them, or given a description of or an opportunity to explain any alleged discrepancies they may have contained. (Tr. 221–222.)

Prevatt, she contends, also questioned her about Dugal's April 7 appointment, and whether he received any medications during that visit. Lashbrook told Prevatt that she had not worked April 7, that either Foran or Haack, both of whom worked on April 7, must have taken Dugal to his appointment that day, but that, as the medical coordinator, she knew that Dugal was given medication for constipation during that visit. Lashbrook recalls Prevatt asking her about the practice at the Morowske Home for distributing medicines, and she describing for Prevatt the training and certification process for employees to become medical coordinators. Prevatt asked Lashbrook if she had ever been asked by someone not authorized to pass out medications to do so on their behalf, and Lashbrook admitted having done so in a prior occasion when the Home was understaffed. She also recalled being questioned about the health care chronologicals and how they were to be filled out, and about the payroll sheets. As to the latter, Lashbrook recalls Prevatt asking if Lashbrook knew if anyone had signed out for her. Lashbrook answered that she was not aware of it. She also recalls denying to Prevatt having falsified the timesheet. (Tr. 147.) Prevatt also asked Lashbrook if she was aware of any discrimination taking place at the Morowske Home and whether she viewed Romain as a good assistant supervisor. Lashbrook denied knowing of any discrimination at the Home, and told Prevatt that she believed Romain did his job well.

Lashbrook also recalls Prevatt asking if she knew how her supervisor felt about the Union. Lashbrook denied having any such knowledge. Prevatt, she contends, then asked if she knew that conducting union business or discussing union business on company time could lead to termination. Lashbrook replied that she was not fully aware of it, and Prevatt responded, "Now you are." Prevatt then asked if there was anything Davis could do to make Lashbrook's job better, and Lashbrook answered, "No." Finally, Lashbrook recalls Prevatt asking her as the interview was ending where Lashbrook, who apparently was sporting a tan at the time, had gotten the tan. At the conclusion of the interview, Lashbrook was instructed to leave the facility and speak to no one. (Tr. 123–132.)

Prevatt testified, contrary to Lashbrook, that she made specific reference to, and questioned Lashbrook about, Dugal's April 4 doctor's visit during the interview, and that Lashbrook was shown the April 4 health care chronological, identified the signature therein as hers, and admitted taking Dugal to the doctor on April 4. Prevatt denied that Lashbrook explained to her how she had tried, without success, to change Dugal's April 7 appointment to April 4, and characterized Lashbrook's claim in this regard as "ridiculous and dishonest" because, she contends, Lashbrook had explained in detail how she had taken Dugal to the doctor on April 4. (Tr. 1279.) Prevatt could not recall whether she or Davis gave Lashbrook the health care chronological to review during her interview. Prevatt also did not recall showing Lashbrook a copy of the van log during the interview, nor questioning her about it. Prevatt further denied talking about the Union with Lashbrook, or the latter raising the subject, during her interview. Finally, Prevatt recalls asking Lashbrook if she had used the van for personal use on April 4, and Lashbrook denying having done so. She claims that her suspicion that Lashbrook lied about an April 4 doctor's visit regarding Dugal was confirmed after she interviewed Foran.

Davis provided some testimony regarding Lashbrook's interview. She denied that she or Prevatt asked Lashbrook, and Foran for that matter, during their interviews if they knew who had brought the Union in, or who had brought the van to the union meeting, or questioned them about their affiliation with, or views on, the Union. On the question of whether Lashbrook and/or Foran were specifically asked whether they took Dugal to the doctor on April 4, Davis testified, in a somewhat vague and not quite responsive manner, "We [her and Prevatt] were talking about the doctor's appointment on April 4." Thus, while her testimony in this regard suggests that she and Prevatt were referring to Lashbrook's activities on April 4, it does not necessarily follow from her above testimony that Lashbrook and Foran was expressly asked whether they took Dugal to the doctor on April 4. When asked what types of questions were asked of Lashbrook, she answered that "Kasie had asked about what time the appointment was, what had happened, the routine of that day. What the doctor had said about anyone else that went to the appointment. What happened

during the appointment, that type of thing." (Tr. 1258–1259.)

I credit Lashbrook over Prevatt and Davis as to what was asked and discussed during Lashbrook's interview. From a demeanor standpoint, inconsistencies in her testimony, and her poor independent recollection of events, Prevatt's testimony regarding this and the other interviews is unreliable and untrustworthy. Thus, as credibly testified by Lashbrook, I find that Lashbrook never stated during her interview that she and Foran took Dugal to a doctor's appointment on April 4. I find instead that Lashbrook told Prevatt and Davis that she had tried, but was unable, to get Dugal's physical checkup appointment scheduled for April 7, moved up to April 4, and that Dugal was in fact seen by a doctor on April 7, not April 4. I note in this regard that Davis' notes make no reference to any discussion having occurred during Lashbrook's interview regarding this alleged April 4 doctor's visit.

f. Bibbee

Bibbee followed Lashbrook in the interview process. She recalled seeing both Prevatt and Davis taking notes during her interview, and Prevatt asking most of the questions. Among the questions asked of her were whether she had seen medications being prepared for others to administer, whether the payroll sheet was always readily available for her to sign, whether she was aware of any discrimination taking place, and whether she had seen the Morowske van at a union meeting. (Tr. 424–425.) As to the medications, Bibbee told Prevatt that the medications were not being improperly distributed, and that either the home manager or someone else authorized to do so took care of distributing medication. Regarding the payroll sheet, Bibbee answered that the sheet was always available except when it was being processed to be sent to payroll. On the discrimination issue, Bibbee told Prevatt that everyone was treated equally at the facility, and denied seeing the van at a union meeting. Bibbee was also asked if she knew how the Morowske Home manager or assistant manager felt about the Union, to which she answered no. She contends that Prevatt at one point asked whether she had attended a staff meeting at Morowske Home during which the Union was discussed. Bibbee answered that she had, at which point Prevatt asked who had brought up the "union talk." Bibbee answered that she did not know. Prevatt also asked if Bibbee had seen the posting on the bulletin board about the Union, and Bibbee answered she had not. The entire interview, according to Bibbee, lasted about 15 minutes, after which she and employee Gevedon left the facility together. (Tr. 423–429.)

Prevatt was not questioned about her interview of Bibbee, and consequently, did not deny Bibbee's assertion that Prevatt asked her about a staff meeting at Morowske Home where the Union was discussed, and then asked who had brought up the "union talk." Accordingly, I credit Bibbee's account of what transpired during her interview, including her claim of being asked by Prevatt who, during the staff meeting, had raised the subject of the Union.

g. Abrakian

Abrakian was called in between 3:15–3:30 p.m. to be interviewed, and testified that Prevatt asked the questions while Davis took notes. Prevatt, she contends, asked if she was aware that the Company van had been seen at an 11 a.m. meeting on April 4, and that she answered she was not. Prevatt also asked Abrakian if she knew how the supervisors felt about the Union, and if she was aware who initiated the union talk at the Home. Abrakian answered no to both questions. Abrakian clearly was not being truthful in claiming not to know who was responsible for the Union's arrival at the Home, for, as previously discussed, it was Abrakian who first contacted the Union and who arranged for the April 4 union meeting. Prevatt, she contends, then asked her to describe the procedure for distributing medications, and also asked Abrakian if she had "punched" out medications for others to distribute, or vice versa. Abrakian denied doing so. Abrakian also denied Prevatt's query on whether anyone had ever asked her to sign them in or out for the day. Abrakian contends that Prevatt also asked if she was aware of the Company van being used for nonwork-related reasons. Abrakian denied any such knowledge. Other questions asked of her related to the payroll sheet, e.g., if it was always available for her to sign in and out, and whether she was being paid for overtime.

Prevatt also questioned Abrakian on how she received the copy of the budget and what she had done with it, and whether Abrakian knew that by taking it, she was violating the confidentiality agreement between the Company and herself. Abrakian answered that she was unaware of any confidentiality agreement, that the budget had been left by the fax machine, and that after taking home a copy of the budget, she threw it away in her garbage can. Abrakian recalls telling Prevatt that the budget was not stamped confidential and that, to her knowledge, Morowske Home was a nonprofit corporation, and that the financial statements of nonprofit companies were a matter of public record. Prevatt, she contends, then cautioned that if she removed any other paperwork from the Morowske Home, she would be fired. (Tr. 482.) According to Abrakian, Prevatt then told her that if there was anything that she, Prevatt, could do to make the workplace better, to let Davis know. Abrakian contends she took advantage of Prevatt's offer by asking why employee paychecks no longer came with a pay stub attached detailing their pay rates. Prevatt commented that paychecks should have stubs attached, and asked Davis to resolve this matter with the front office immediately. The interview, according to Abrakian, ended around 3:50 p.m. (Tr. 480–483.) Abrakian testified that following the April 14 interviews, she refrained from discussing the Union at work with anyone else because of Prevatt's admonition just prior to the interviews that they would be terminated if they did so. (Tr. 502.)

Prevatt testified that prior to interviewing Abrakian, she had already been told by Pettyplace and Davis that Abrakian had removed a financial document from the facility and shared it with others. She claims that when she interviewed Abrakian, her first question to Abrakian was "what she did with the financial document that she took out of the house without

permission and shared with others."[22] She contends that when Abrakian answered that she had thrown it away, Prevatt again asked, "You took a financial document that you know was confidential and belonged to the company out of the house without permission, shared it with others, then threw it away?" Abrakian reiterated that she had. Prevatt denies being told by Abrakian that the financial document, e.g., the budget, was not stamped "confidential," and, indeed, claims that Abrakian acknowledged that the budget was a confidential document. (Tr. 1228.) Prevatt contends she did not ask Abrakian why she had taken the budget. She denies asking Abrakian if she was affiliated with a union or what her views were regarding unions. She also denied asking Abrakian if she had seen the van at a union meeting, explaining that she viewed questions about employee's involvement with a union to be inappropriate. (Tr. 1232–1233.) Prevatt, however, never denied asking Abrakian if she aware who initiated the union talk at the Morowske Home. Finally, according to Davis, Abrakian, during her interview, denied having a copy of the budget but subsequently admitted on questioning by Prevatt that she took the budget home and discarded it.

I found Abrakian's version of her interview more credible than that provided by Prevatt or Davis. Several factors lead me to doubt Prevatt's account. First, I find it hard to believe that Prevatt, who had difficulty testifying about the April 14 interviews without resorting to Respondent Exhibit 7, her alleged interview notes, was nevertheless able to recall word-for-word the first question she put to Abrakian during the latter's interview. Her representation in this regard struck me as pure fabrication, more likely than not intended to convince others of her interrogation skills. Nor do I believe that Prevatt ever asked Abrakian if she shared the Company budget with others at the April 4 union meeting, or elsewhere for that matter, for no mention of any such inquiry being made of Abrakian is found in Respondent Exhibit 7, or in Respondent Exhibit 32, Davis' interview notes. Abrakian, as noted, testified that while she had the budget with her when she went to the April 4 union meeting, she did not share it with anyone. Nothing in Respondent Exhibits 7 or 32 contradicts Abrakian's claim in this regard. Accordingly, I find, consistent with Abrakian's testimony, that she never told Prevatt or Davis during her interview that she had shown the budget to others at the April 4 meeting. I further believe Abrakian's assertion that Prevatt cautioned her not to remove any other documents from the Home or she would be fired. I also credit, over Prevatt's denial, Abrakian's claim that Prevatt asked her if she knew who had initiated the union talk at the Morowske Home, for Bibbee, as found above, was asked basically the same question by Prevatt during the former's interview. As to Davis' claim that Abrakian initially denied taking the budget, her own notes make no mention of any such denial by Abrakian, and the latter's own testimony, which I credit, reflects that she admitted outright during her interview to copying the budget and leaving the Home with the copy.

h. Foran

The last one to be interviewed, Foran testified to being called in around 3:40 p.m., and recalled Prevatt doing much of the questioning and Davis taking notes. The first question posed to her centered on her activities on April 4. Foran went on to describe to Prevatt that on arriving to work, she read her books, punched the meds, did breakfast, got the guys up, and then took the guys to the clubhouse, and came back and left at 10:30 a.m. Prevatt then asked if she knew Dr. Lovy, to which Foran replied that she did. Prevatt followed up by asking if she had taken Dugal to see the doctor, and Foran stated she had. Foran testified that Prevatt never referred to this doctor's visit as having occurred on April 4, and that she believed Prevatt was asking about the doctor's visit which she and Haack took Dugal to on April 7. (Tr. 309.)

In response to questions by Prevatt regarding the doctor's visit, Foran, under the impression that Prevatt was referring to the April 7 doctor's appointment, stated that she went into the examining room with Dugal, that the latter was given a prescription for Senokot medication for his constipation, and that they left the doctor's office between 12–12:30 p.m. Prevatt also asked about the health care chronologicals and whether the payroll sheet was always available. Foran answered that, as the medical coordinator, Lashbrook filled out the health care chronologicals, and that the payroll sheet had always been available. Foran denied Prevatt's query on whether anyone had ever signed her out on the payroll sheet. She further claims that she was unaware during the interview that someone had indeed signed her out when she left early on April 4. She testified that at no time during the interview was she shown copies of the payroll sheets or the health care chronological covering the April 4 date or any other period. Nor did Prevatt or Davis describe these or any other documents to her or asked her to explain the contents of any documents.

Foran also recalls Prevatt asking if she knew that using the Company van for personal reasons could result in termination. Foran answered that she did not. Prevatt then asked if Foran was aware that the van had been spotted at a union meeting, and Foran again answered she did not. Prevatt went on to ask Foran if she knew who had "initiated" the Union at the Home, and Foran said she did not. Foran admits she was not being candid with Prevatt in this regard, explaining that she was "scared" of revealing what she knew about the Union. Prevatt, according to Foran, also asked whether medications were being improperly distributed, whether she had seen the budget that

[22] Given her overall inability to testify about the events of April 14, without consulting R. Exh. 7, her alleged notes, I find it hard to believe that Prevatt could recall word-for-word the first question she asked Abrakian during the latter's interview. Undermining Prevatt's claim, that her first question to Abrakian included a query on whether the latter had shared the budget with others is the fact that R. Exh. 7, which Prevatt, as noted, testified are her notes of the interviews, makes no mention of Prevatt asking if Abrakian had shared the budget with anyone. Davis' own notes of those interviews, R. Exh. 32, likewise contains no mention of any such question being asked of Abrakian. I therefore reject as not credible Prevatt's claim that she asked Abrakian during the latter's interview if she had shared the budget with others, and that Abrakian admitted doing so.

Abrakian had taken, whether she knew of any discrimination taking place at the facility, and whether she had worked overtime without getting paid. Foran answered each question in the negative.

Finally, Foran was asked if she had any keys to the office and to the supply closet. She admitted having a set of keys, explaining that Haack had authorized her to have the keys because she was, at the time, the medical coordinator and, as such, needed access to items such as diabetes medication for Home clients. Foran also admitted, in response to Prevatt's question, knowing the combination to the Company safe, explaining to Prevatt that this was common knowledge. Prevatt then told Foran she would have to relinquish the Home keys to her, and Foran agreed to do so. Finally, Foran recalls Prevatt asking if there was anything that could be done to make the Morowske Home a better workplace. In response, Foran suggested that classes be held on how to get along. (Tr. 313.) At the conclusion of the interview, Foran went back outside to where she had left her purse, retrieved the keys, and handed them to Prevatt.

Prevatt testified, contrary to Foran, that the first question she asked the latter was whether she had gone to a doctor's appointment with Dugal on April 4, and that Foran answered she had. Prevatt contends that Foran could not have believed that she was being asked questions about Dugal's April 7 doctor's visit, and not the alleged April 4 visit, because "there was no discussion" at all about April 7, and there was repeated reference to April 4 during Foran's interview. Foran was then asked to describe her activities that day. She contends Foran recounted how she and Lashbrook took Dugal to the doctor at around 10 a.m. for an earache. Prevatt recalled Foran becoming irritated at the questions posed to her about the doctor's visit. According to Prevatt, Foran told her she and Lashbrook took turns waiting in the examining room with Dugal, that the doctor prescribed Senokot medication for Dugal, and that they left the doctor's office around noontime. When she asked Foran what had happened with the earache complaint, Foran said that nothing could be done for it. Prevatt was unable to recall what else she may have asked Foran about the visit without referring to Respondent Exhibit 7. On reviewing her notes, she recalled asking Foran if Dugal had eaten lunch, and Foran responding that he must have. Foran, she contends, was unable to give her a definitive answer on whether Dugal had lunch that day. Prevatt contends she also asked Foran if she knew whether the van was being used for personal use, and Foran replied she did not know. Prevatt also recalled asking Foran, as she did with Lashbrook, if she had used the van for personal reasons on April 4, and Foran answering she had not. (Tr. 1319.)

Prevatt contends she also questioned Foran about her relationship with Haack, and stated her belief that Haack was Foran's niece. Foran denied Haack was her niece. Prevatt also asked if Haack had given her the keys and combination to the safe, and Foran denied having them. According to Prevatt, during his interview, Romain expressed concern to her that Foran had the keys and the combination to the safe at Morowske Home, that he had been instructed by someone to retrieve the keys from Foran, and that, when he attempted to do so, Foran denied having them. (Tr. 1317–1318.) Prevatt contends that when she again asked Foran if she had the keys, Foran changed her story and admitting having them when Prevatt questioned why she would receive reports about Foran having access to areas requiring the keys. When Prevatt asked if she had the keys with her, Foran got up, left the room to retrieve the keys, and on returning handed them to Davis. Prevatt concluded from her interview of Foran that the latter had lied and been dishonest about the events of April 4, about having keys to the Home, about the personal use of the van, and generally about everything else. (Tr. 1234–1246.)[23]

Davis also provided some testimony regarding Foran's interview. Davis recalled Prevatt asking Foran about the Morowske Home keys, and testified that Foran at first repeatedly denied having them but subsequently admitted having them. Davis also testified, in response to a leading question from Respondent's counsel, that Foran provided information regarding a doctor's visit on April 4.[24] Further, contrary to Prevatt's assertion, Davis testified that neither Foran nor Lashbrook were shown any documents during their interviews. (Tr. 1542.) Davis denied that Foran or Lashbrook were ever asked by herself or Prevatt who had brought the Union to the workplace, who had taken the van to the union meeting, or whether they had engaged in union activity on company time or their views on the Union. She also claims that neither she nor Prevatt asked any of the employees interviewed questions about their involvement with the Union. (Tr. 1545.)

E. General Credibility Findings

As shown and found above regarding the individual interviews, Prevatt was not a credible witness from a demeanor standpoint and because of the numerous inconsistencies and discrepancies in her testimony. Prevatt's inability to recall much without resorting to Respondent Exhibit 7, her alleged interview notes, also casts doubt on the reliability of her testi-

[23] R. Exh. 7, Prevatt's alleged interview notes, show Romain stating during his interview that Foran "has keys to everything . . . and has gotten into [the] safe." Prevatt testified that during his interview, Romain expressed concern that Foran had the Home keys and combination to the safe. She further testified to Romain mentioning during his interview that he had been directed sometime in March by someone, she was unable to recall whom, to retrieve the keys from Foran but that, when he sought to do so, Foran denied having a set of the Morowske Home keys. In his testimony, however, Romain made no mention of having engaged in any such discussion about Foran and the keys with Prevatt during his interview. Given the unreliability of R. Exh. 7 and Romain's failure to corroborate Prevatt's assertion as to what he may have said during his interview, Prevatt's testimony in this regard is rejected as not credible. Indeed, even R. Exh. 7, Prevatt's alleged notes, do not corroborate Prevatt's testimonial claim that Romain expressed concern about Foran having the Home keys, that he had been instructed to retrieve the keys from Foran, and that the latter denied having them.

[24] Davis had initially stated only that they began discussing a doctor's appointment following the discussion about the keys. After asking Foran some more questions about the keys, Respondent's counsel brought Davis back to the subject of the doctor's visit by telling Davis to return to her discussion about the doctor's appointment on April 4. Davis had not mentioned April 4, as the date of the doctor's appointment until it was suggested by Respondent's counsel. (Tr. 1535–1536.)

mony. Prevatt, for example, had no recollection of meeting or interviewing employee Gevedon on April 14, despite Respondent's own evidence, Respondent Exhibit 32, showing that Gevedon was indeed interviewed by Prevatt and Davis that day. Prevatt also seemed confused at times, as when she got Jenkins mixed up with Schwark in her testimony, and when she stated that Foran followed Lashbrook in the interview process. The record makes clear that Bibbee and Abrakian were interviewed after Lashbrook, followed by Foran. Further, Prevatt's testimony regarding her preparation of Respondent Exhibit 7 also undermines her credibility as well as the reliability and trustworthiness of that document.

Regarding Respondent Exhibit 7, Prevatt testified that following the April 14 interviews, she met briefly with Davis and then went home. She contends that later that evening and during the morning of the following day, April 15, she transcribed her handwritten notes of the interviews into the typewritten form which is Respondent Exhibit 7 on her home computer, and then e-mailed Respondent Exhibit 7 to Pettyplace on the afternoon of April 15, as an attachment to an e-mail coverpage, and then discarded her handwritten notes. Although she claimed at the hearing that Respondent Exhibit 7 is an "accurate reproduction" of her discarded handwritten notes, Prevatt admitted to having supplemented her handwritten notes with some of her own recollections of what transpired during the interviews, and that Respondent Exhibit 7 was not a word-for-word transfer of her handwritten notes, pointing out in this regard that she included in Respondent Exhibit 7 what she deemed to be "appropriate." (Tr. 1295–1296.) Regarding the questions she purportedly asked all employees during their interviews and which are set forth on the first page of Respondent Exhibit 7, Prevatt admits that Respondent Exhibit 7 contains only a synopsis, and not an actual word-for-word transcription, of the questions. (Tr. 1292.) At no point in her testimony did Prevatt explain or identify the portions of Respondent Exhibit 7 that were supplemented by her and which were not in her handwritten notes, or how she determined what in the handwritten notes was "appropriate" or not " appropriate" for inclusion into Respondent Exhibit 7. Nor did she offer to explain the obvious discrepancy between her claim that Respondent Exhibit 7 is an "accurate reproduction" of her handwritten notes, and her admission that she supplemented the handwritten notes during transcription with her own post-interviews recollection of events, and that Respondent Exhibit 7 does not reflect "word-for-word" of what was contained in her handwritten notes. In the absence of any such explanations, and without the handwritten notes, Prevatt's claim that Respondent Exhibit 7 is an "accurate reproduction" of her handwritten notes cannot be verified or substantiated. If anything, Prevatt's description of Respondent Exhibit 7 as an "accurate reproduction" of her handwritten notes conflicts with her own testimony about supplementing her handwritten notes with her own recollection of events.

Other discrepancies and/or inconsistencies in Respondent Exhibit 7 itself, and in Prevatt's testimony, further serve to undermine the reliability and trustworthiness of Respondent Exhibit 7, as well as Prevatt's own credibility. As previously discussed, Jenkins was the first employee to be interviewed, followed by Gevedon. Romain was the fifth person interviewed. While Davis' handwritten notes reflected in Respondent Exhibit 32 were apparently taken and follow the order in which the employees were interviewed, Respondent Exhibit 7 does not. Thus, although Romain was the fifth person interviewed, the notes of his interview appear first on Respondent Exhibit 7, while the notes taken of Jenkins' interview, who was the first to be called, appear on the bottom of the first page of Respondent Exhibit 7. As Jenkins was the first to be interviewed, one might reasonably and logically expect that Prevatt's notes of that interview would have been recorded first or at the beginning of the handwritten notes, and thereafter transcribed by Prevatt onto Respondent Exhibit 7 in exactly the same manner, especially given Prevatt's claim that Respondent Exhibit 7 is an accurate reproduction of her handwritten notes. Prevatt could not explain why the notes of Romain's interview notes, and not those pertaining to Jenkins, appear at the beginning of, or first on, Respondent Exhibit 7. (Tr. 1202–1203.)

Further undermining the reliability of Respondent Exhibit 7 is Prevatt's inconsistent and vague testimony regarding what was asked by her of Romain during the interview about the van being at a union meeting, and what Respondent Exhibit 7 contains in this respect. Thus, at one point in her testimony, Prevatt claimed to have asked Romain during his interview whether he had seen the Morowske van at a union meeting. Respondent Exhibit 7, however, shows Prevatt asking Romain if he had seen the van at "*the*" meeting. Prevatt initially stated that Respondent Exhibit 7 was wrong in that the question to Romain pertained to "*a*" meeting, not "*the*" meeting. She subsequently changed her testimony, stating that she was not sure if she had referred to "*the*" meeting instead of "*a*" meeting when posing the question to Romain. Yet, when asked by the Respondent's counsel later in her testimony if Respondent Exhibit 7 contained any errors that needed to be corrected at the hearing, Prevatt answered no. Clearly, this answer was not entirely correct, for given her uncertainty and confusion as to the question posed to Romain, Prevatt could not say with certainty whether or not Respondent Exhibit 7 correctly reflected what she asked Romain. Prevatt's ambiguity and uncertainty in this regard undermines not only her credibility as to the April 14 events, but also the reliability and accuracy of Respondent Exhibit 7.

Also casting doubt on the reliability of Respondent Exhibit 7 is Prevatt's and Pettyplace's testimony regarding the transmission of Respondent Exhibit 7 by the former to the latter on April 15. Pettyplace testified to receiving Respondent Exhibit 7 from Prevatt by e-mail. However, when questioned on voir dire examination by the General Counsel regarding her receipt of Respondent Exhibit 7, Pettyplace initially testified that Respondent Exhibit 7 did not come attached to an e-mail, as claimed by Prevatt, but rather came as the e-mail itself, without identifying who it was from. She testified that on receipt of the e-mail, she clicked on it and Respondent Exhibit 7 immediately opened up. Pettyplace explained that she knew it came from Prevatt because the latter had called to advise her that Respondent Exhibit 7 was being sent, suggesting implicitly by this latter testimony that the e-mail did not identify the sender. However, shortly thereafter, during questioning by Respon-

dent's counsel, Pettyplace changed her testimony, claiming she had been confused by the General Counsel's questions. She went on to explain that Respondent Exhibit 7 did indeed come as an attachment to an e-mail cover page from Prevatt.

At the hearing, both Pettyplace and Prevatt claimed that they searched for but were unable to locate the e-mail cover page to which Respondent Exhibit 7 was purportedly attached. Pettyplace could not recall downloading or making a hard copy of the cover page. Prevatt, for her part, theorized that the document may have been automatically deleted by AOL, her internet provider, but also conceded she may have deleted the cover page herself. (Tr. 1296.) The Respondent at the hearing sought to downplay the importance or significance of the alleged cover page by noting that, except for identifying Prevatt as the sender, the cover page was essentially blank and contained no other information on it that would be of relevance to the proceeding. But for Prevatt's overall poor performance as a witness and her lack of credibility on other matters, I might have accepted Prevatt's undisputed assertion that the cover page, if indeed one was sent, was blank and contained nothing of relevance to the issues raised in this proceeding. Given her unreliability as a witness, I simply do not believe Prevatt's claim that the e-mail cover page was blank. Thus, I find it highly unlikely that Prevatt would have sent Pettyplace a blank page with Respondent Exhibit 7 attached to it without including some explanation as to what it was that was being sent.

I also found unconvincing Pettyplace's and Prevatt's testimony regarding the latter's transmission and the former's receipt of Respondent Exhibit 7. Pettyplace's explanation for changing her testimony on how she received Respondent Exhibit 7, to wit, that she was somehow confused by the General Counsel's question, was not credible, for there was nothing particularly confusing about the General Counsel's question. Pettyplace in this regard never hesitated or displayed any uncertainty or confusion in initially claiming that Respondent Exhibit 7 came without a cover page, and instead answered with unqualified conviction that, despite the absence of a cover page, she knew it was sent by Prevatt because the latter had called to say the e-mail was being sent.

As to Prevatt, her own testimony about the extent of her education and experience in conducting investigations of the kind conducted herein, and in the field of labor relations in general, undermines, in my view, her claim that she destroyed both the e-mail to which the Respondent Exhibit 7 allegedly was attached, as well as the underlying handwritten notes which purportedly formed the basis for Respondent Exhibit 7. For example, Prevatt at the hearing, described in great detail the extent of her education and experience, and noted, with some pride, that during her more than 18 years in the industry, she has conducted between 2–4 investigations a year. Pettyplace likewise described Prevatt as a highly skilled investigator. Given the level and extent of her experience, I find it difficult to believe that Prevatt would not have had sufficient foresight to retain documents which someone with her level of education and experience could easily have surmised would be useful and relevant to any future inquiry into these matters. In sum, I view Prevatt's representation that she discarded the documents in question with a high degree of skepticism. Indeed, I strongly suspect that Prevatt never actually took notes during the interviews. In this regard, I note that most of the employees who were questioned about their interviews testified to seeing Davis take notes, but not Prevatt. Further, Pettyplace herself testified that the standard practice during the conduct of any such investigations is that one person will do the questioning while the other takes notes. Thus, my suspicion is that Respondent Exhibit 7 represents Prevatt's post-interviews recollection of what she believes transpired during the interviews, and not a copy of any handwritten notes taken by Prevatt during those interviews.

As to Davis, her testimony, as described above in individual circumstances, was generally not very reliable. Davis, who seemed not to have too much difficulty on direct examination answering questions put to her by the Respondent's counsel, became forgetful on cross-examination, and repeatedly responded "I don't know" or "I don't recall" to questions she would have been expected to answer in a straightforward manner as the person who purportedly initiated and looked into the employee complaints which led to the April 25, discharges of the alleged discriminatees. Davis was, at times, inconsistent and self-contradictory. Accordingly, I found her testimony unconvincing and generally not particularly credible.

Pettyplace's testimony suffers from the same deficiencies as Davis'. Her demeanor on the stand was one of arrogance. Pettyplace, at times, rambled on to the point where she had to be asked to stop and wait for the next question. (Tr. 870; 899.) She also seemed somewhat hostile to the General Counsel. Her testimony was at times self-contradictory, as, for example, when she claimed to have seen Respondent Exhibit 33, the letter purportedly written by Schwark, during her April 8 meeting, when it is clear she could not have done so as the letter appears to have been prepared on April 11. She subsequently changed her tune to reflect that she indeed had seen the letter on her return from Arizona. Further, her claim that Davis read the letter to her over the phone was, as noted, put in doubt by Davis herself, who testified that she did not recall reading or showing Respondent Exhibit 33 to anyone in management. Accordingly, I accord little weight to Pettyplace's overall testimony.

F. The Post-April 14 Events and Terminations

Haack, as noted, was not interviewed by Prevatt or Davis during the employee interviews. Instead, at around 4:30 p.m., after the employee interviews were over, Haack was summoned to her office by Prevatt and Davis and told by Prevatt that she was under investigation. When Haack asked why she was being investigated, Prevatt purportedly told her that she was not at liberty to discuss it but would be told why at a supervisors' meeting that was to be held the following day, April 15. (Tr. 622.) Prevatt told her she could leave but not to discuss anything with anyone regarding this matter. On April 15, Haack attended a supervisors' meeting at the Respondent's Midland offices attended by Davis, Romain, and the Home supervisors of the Respondent's other homes. At this meeting, Haack received a prize of a stuffed giraffe for having a perfect petty cash account.

Later that same day, Haack received a report from Bibbee about seeing Jenkins make a fist at Abrakian behind her back as

the latter walked past her, and that employee Gevedon had witnessed the incident. Haack also recalls receiving a call from Abrakian regarding this incident, probably the following day, April 16, saying that Davis wanted Haack to call her. Haack claims she instead phoned Pettyplace on April 17, to discuss what to do. Pettyplace, she contends, told Haack that she maintained a zero tolerance for workplace violence and that Jenkins would have to be terminated. (Tr. 629.) On instructions from Pettyplace, Haack phoned Davis and spoke with her about the incident a short while later. Davis told Haack that she and Pettyplace had decided to suspend, rather than terminate, Jenkins, but did not explain why. Haack then obtained written statements from Bibbee, Abrakian, and Gevedon regarding the incident and faxed them to Pettyplace, and to the Respondent's recipient rights advisor, Jan Audia. Jenkins declined to provide her with a statement.

Prevatt made no mention in her testimony of meeting with Haack following the employee interviews, and testified only to briefly meeting with Davis following the interviews and then leaving the facility. She could not recall when she left the Morowske Home that day following her post-interviews discussion with Davis, and believed it might have been between 12:30–1:30 p.m. This timeframe does not square with the claim made by several employees who testified to being interviewed in mid to late afternoon, e.g., as late as 3:30 pm, on April 14. Nor could Prevatt recall where she went after leaving the Morowske Home, or what time she might have arrived at her home that day. She also had no recollection of when she might have begun transcribing her handwritten notes into Respondent Exhibit 7, or how long she might have worked on it that evening before resuming the transcription the following morning. (Tr. 1294.)

Prevatt claims that not long after the April 14 interviews, she and Davis got together and decided to recommend to Pettyplace that Foran and Lashbrook be terminated for giving false information and/or violating Company policy, and that Abrakian be terminated for removing the budget from the facility and sharing it with others. (Tr. 1286.) She testified that she conducted no further investigation into the matters discussed on April 14, following the interviews, but believes Davis continued to gather and further review documents relating to the investigation. Davis, however, could not recall conducting any further investigation after the April 14 interviews. (Tr. 1583.) At some point following that meeting, Pettyplace, according to Prevatt, approved their recommendations. Prevatt claims she then, with assistance from Davis, prepared the termination letters on or around April 19.

Davis had little recollection of what she did following the interviews. She did not, as noted, recall conducting any further investigation, despite Prevatt's claim that she did so. While she recalled giving Pettyplace her recommendation to discharge these individuals, Davis had no recollection of when she reached her conclusion to recommend termination, or when she may have made her recommendations to Pettyplace.

Pettyplace's testimony regarding when and how the decision to terminate the alleged discriminatees was vague, ambiguous, and not particularly credible. She testified that on returning from her Arizona trip, she met once with Prevatt and Davis to discuss the interviews, and had a second meeting with Davis alone, at which time she made the decision to terminate alleged discriminatees Abrakian, Lashbrook, and Foran, and that the written terminations were prepared at the conclusion of that meeting with Davis.[25] However, when questioned by me, Pettyplace was unsure if her discussions with Prevatt and Davis regarding the discharge decisions occurred in person or over the phone. She also became somewhat combative and confrontational with the General Counsel when the latter sought to probe her recollection into how many conversations she may have had with Prevatt and Davis regarding the investigation after returning from Arizona. Her overall tone and demeanor left much to be desired and conveyed an image of evasiveness. (Tr. 1021–1022.)

As to her testimony regarding when and how the written terminations were prepared, Pettyplace's claim that the written terminations were prepared at the end of her meeting with Davis does not square with Prevatt's assertion that she prepared the written terminations, for according to Pettyplace, she and Davis met alone without Prevatt. Although she claimed sole responsibility for the discharges, incredibly Pettyplace had no clue as to who actually prepared the discharge letters, and claimed not to have had any input into the drafting of the letters or to know who did. She gave the following reasons for the discharges: Abrakian for copying and taking the Company's financial records from the Morowske Home to her home and sharing it with others in contravention of Company policy (Tr. 909–910); and Lashbrook and Foran for lying about taking Dugal to a doctor's appointment on April 4, and falsifying Company records to reflect that such a visit occurred.

Pettyplace testified that she "terminated everyone's employment involved here based on their own testimony, the information that they gave us." This particular claim, however, seems inconsistent with her further claim at the hearing that she also relied on numerous other documents to support the discharge. Thus, she claims to have relied on the forms faxed to her by Haack on April 8 (R. Exh. 31), the medication administration record (R. Exh. 4), the medicine count sheet (R. Exh. 9), the payroll sign-in sheet (GC Exh. 2), and the employee communication log (R. Exh. 26) in discharging Lashbrook and Foran. Further, as to Lashbrook, Pettyplace added that she also relied on Respondent Exhibit 30, the April 8 write-up issued to her by Haack at Davis' insistence, to terminate Lashbrook. (Tr. 865–866; 872; 882; 883–884; 893.) The terminations were carried out on April 25.

[25] Pettyplace claims she also decided to fire Haack because Haack's "behavior demonstrated that she was not honest" and "was comfortable falsifying information" and in "not telling the truth." In short, Pettyplace testified that she just couldn't trust Haack any longer. (Tr. 889.) Pettyplace's stated reasons for discharging Haack stand in stark contrast to the representation made by the Respondent's attorney in his opening remarks that Haack was fired because the Respondent believed she "may have interfered with protected activity by promoting the union." (Tr. 47.) While these inconsistent reasons for Haack's discharge raise a question as to the true reason for the action taken, I do not address that issue as Haack's discharge is not alleged in the complaint to be unlawful.

Abrakian testified to receiving a voice mail from Davis 3 days earlier, on April 22, asking her to be available for a meeting at 11 a.m. on April 25. On April 25, Abrakian arrived for the 11 a.m. meeting, and soon thereafter Davis, accompanied by Christine Reinbold, another of Respondent's program coordinators, arrived. Abrakian was then taken into Haack's office (Haack was not present). On entering the office, Abrakian told Davis that if she was going to be asked any questions, it would have to be done with the door open. Davis, at that point, told Abrakian that she was no longer an employee and handed her a termination letter. When Abrakian asked why she was being terminated, Davis replied that it was all stated in the termination letter. Abrakian refused to sign the termination letter and walked out with her copy without reading it. The letter advised that she was being terminated effective immediately for "Theft, misappropriation and misuse of company property." It explained that on or before April 4, Abrakian had, by her own admission, taken "a financial/budget report from the home, without permission and knowing that it was company property" and that she had thereafter shared "this document with others, outside of the workplace" and then disposed of it. (GC Exh. 17.)

When she got outside, Abrakian read the letter and learned that she had been accused of sharing the copy of the budget with others. She contends she went back inside and informed Davis and Reinbold that she had not, in fact, made any such admission. While she does not deny taking the copy of the budget outside the facility, she contends that the assertions in the discharge letter that she shared it with others and that she knew it was "company property" were false. She did admit that she received no authorization to take the budget from the Home, and to signing a confidentiality statement when she began working for the Respondent. (Tr. 492.) As to the document's confidential status, Abrakian explained that the she did not view the budget to be confidential as it was not stamped as such, as are other documents belonging to Respondent.

Pettyplace testified that she was unaware, until the hearing, of Abrakian's assertion that she did not know the budget was confidential, but claimed that while she might have been willing to listen to Abrakian's explanation before discharging her, it probably would not have altered that decision because Abrakian "was very negative in the way she presented herself; appeared very, you know, angry, you know, angry at the company for who knows what; felt she had a right to those documents." (Tr. 911.) It is unclear if Pettyplace's characterization or description of Abrakian's demeanor was a reference to her behavior during the April 14 interview, or her behavior when notified of her discharge on April 25. Pettyplace, however, was present at neither Abrakian's April 14 interview nor at her April 25 discharge meeting. Pettyplace's characterization of Abrakian's demeanor was therefore not based on any personal observation of Abrakian. Nor is there any record evidence to indicate that Prevatt and/or Davis made any mention to Pettyplace of Abrakian's conduct or demeanor during her April 14 interview, or of Davis having provided Pettyplace with such information during her discharge interview of Abrakian on April 25. In this regard, neither Respondent Exhibit 7, Prevatt's alleged interview notes, nor Respondent Exhibit 32, Davis' notes, contain any description of Abrakian becoming angry or displaying a "negative" attitude during her April 14 interview. Pettyplace's comment about Abrakian's demeanor struck me as purely gratuitous and unsolicited, designed, I am convinced, to depict Abrakian as somewhat of a hotheaded, undesirable employee. Pettyplace's assertion that she would not have altered her decision to discharge Abrakian because of her alleged "anger" and "negative" attitude begs the question, not answered by Pettyplace, of whether Pettyplace would have discharged Abrakian had the latter not been "angry" or "negative."

Foran received a similar phone message from Davis at her home on or about April 22, notifying her to be available for a meeting on April 25 at 11 a.m. Foran was on vacation at the time and was scheduled to return to work on April 25. She reported for work at 6 a.m. on April 25, and, at 11 a.m. went to meet with Davis as had been requested. She recalls Abrakian arriving around that time, and Reinbold and Davis arriving soon thereafter. Once there, Abrakian was called in to meet with Davis and Reinbold in Haack's office, and came out a few minutes later. Foran was then called in. Once inside, Davis informed her she was being terminated and asked her to sign the discharge letter.[26] (GC Exh. 15.) Foran refused to do so. At one point during her meeting, Abrakian came in and told Davis to stop telling lies about her. After Rienbold signed the discharge letter as a witness, Foran received her copy and left. She contends that at no time during the meeting was she orally informed why she was being discharged. Foran did read the discharge letter but only after she left the meeting. Foran claims that at no time between April 14, when the interviews occurred, and April 25, when she received her discharge notice, was she asked any questions about or given an opportunity to address or explain the subjects covered in the discharge letter.

Lashbrook, like Foran, was left a message on her answering machine on April 24, by Davis asking that she attend a meeting at 11 a.m. the following day. Earlier that day, Lashbrook had told Haack that she would be seeing a doctor on April 25, for a back problem she was having, and received permission from

[26] The discharge letter, GC Exh. 15, describes three categories of misconduct by Foran as forming the basis for her discharge. The first category "Dishonesty" includes: (a) providing false information during an investigation; (b) claiming to have attended an April 4, 2005 medical appointment with a consumer that never occurred; (c) failing to report the falsification of the health care chronological; (d) failing to report the alteration or falsification of the medical consult form; (e) stating during the investigation that she left work early between 12:30 p.m.–1 p.m. on April 4, but signing out at 2 p.m. The secondary category "Misappropriation of company equipment and time" includes: (a) use of the company van for personal use; (b) conducting personal business on paid time; (c) documenting time spent doing personal business on paid time. The third category, a more general one, simply states that Foran "refused to acknowledge the unauthorized possession of the safe combination as well as the keys to the offices and records of the home; or to relinquish the keys when asked by the assistant home supervisor. It further states that when initially interviewed by Prevatt on April 14, Foran "denied having possession of the keys" and only on further discussion admitted having access to offices, files, and the safe as recent as March 2005, and that following this conversation with Prevatt, Foran relinquished the keys to Prevatt.

Haack to take time off on April 25, for that purpose. On April 25, presumably after the doctor's visit, Lashbrook received word from her boyfriend that Davis was trying to get a hold of her and left word with him to call Davis. When Lashbrook did so, she was told by Davis that she had been terminated. Lashbrook then asked Davis why she was being terminated, but Davis simply stated that she could read the reasons on the discharge letter she was being sent by mail. Lashbrook asked why she could not tell her the reasons over the phone, but Davis declined to do so, and hung up after repeating that Lashbrook was given the reasons in the discharge letter. Lashbrook received her discharge letter on April 27. (See GC Exh. 14.)

The reasons cited in Lashbrook's discharge letter for her termination included "dishonesty," the use of the Morowske van for personal use, conducting personal business on paid time, and documenting time spent doing personal business as time worked. Under the charge of "dishonesty," Lashbrook was accused of providing false information during an investigation, falsely claiming to have attended an April 4 medical appointment which never occurred, falsifying health records, e.g., the health care chronological, altering or falsifying medical records, e.g., the medical consult form, and falsifying the van log.

While she admits not being forthright during her April 14 interview about knowing how Haack felt about the Union, Lashbrook insists that at no time during her interview did she claim to have taken Dugal or any other consumer to a doctor's appointment on April 4. She also denied falsifying any Company documents, including the health care chronological or the medical consult form, as asserted in her discharge letter, and denied telling Prevatt or Davis during her interview that some other direct care worker took Dugal to the doctor on April 4. (Tr. 139–140.) Lashbrook further denied having used the van to go to a union meeting on April 4, or for personal, nonwork-related reasons, and denied recording on the April 4 timesheet her personal time off as having been worked by her. Finally, Lashbrook testified, without contradiction, that at no time following her interview was she given a chance to respond to, or discuss, the reasons for termination set forth in her discharge letter.

On June 8, the Board conducted an election among the direct care employees which was won by the Union. Davis served as the employer's observer during that election. As evidenced by General Counsel Exhibit 11, the voter eligibility list, neither Jenkins nor Schwark voted in the election. (GC Exhs. 11, 12, 13.) The last named discriminate, Bibbee, was discharged a few days later, on June 13, purportedly for violating Company policy against sleeping on the job. (GC Exh. 16.) The incident occurred on June 10, while Bibbee worked the midnight shift.

According to Bibbee, she reported to work at 8 p.m. on June 9, and was scheduled to work through 6 a.m. on June 10. Jenkins was her coworker on the midnight shift. The Respondent maintains a written policy in its employee handbook that strictly prohibits employees from sleeping while on duty. (R. Exh. 3, p. 69.) Bibbee acknowledged knowing of this restriction. She testified that at around 3 a.m. on June 10, while on duty, she was watching television as the consumers slept and admittedly dozed off for about 15 minutes. At one point, Davis walked in and caught her napping, and simply told her to stay awake and then left. (Tr. 444.) Bibbee recalls that on the morning of June 10, she told Romain that she had been caught sleeping on the job and would probably be fired for it. She informed Romain that if she was to be fired, that he should call her in advance so that she would not have to drive all the way back to Morowske Home just to be told she was being fired. Schwark was present when she had this conversation with Romain. Bibbee further recalls telling Jenkins that she expected to be fired for sleeping on the job. (Tr. 451.)

After completing her shift, Bibbee left. However, as she predicted, Bibbee received a phone call from Romain later that day telling her not to report for work that evening and that Davis wanted to see her on June 13. Bibbee asked Romain if she was going to be fired and Romain responded in the affirmative. Bibbee went to see Davis on June 13, and met with Davis and Romain. At this meeting, Davis handed Bibbee a termination letter and asked her to sign it, but Bibbee refused to do so. Bibbee asked why Jenkins was not being terminated for failing to report her (Bibbee) to Davis, but received no answer. Bibbee admits knowing that sleeping on the job was a dischargeable offense. (Tr. 450.)

Evidence was produced at the hearing showing that on or about April 27, a few months before Bibbee was discharged, Jenkins, on two occasions, was observed by fellow employee, Stephanie Byrd, sleeping on the job. Unlike Bibbee, no action was taken against Jenkins. Byrd testified in this regard that she reported Jenkins' sleeping incidents to Davis at the end of her shift, and that Davis said she would look into it. Byrd claims that she followed up on her report to Davis about 1 week later and that Byrd told her that Jenkins had been working double shifts and too many hours and had been tired. Byrd does not know if Jenkins was ever disciplined based on her report. Davis denied ever receiving any such report from Byrd. I credit Byrd over Davis regarding this incident. Byrd was subpoenaed to testify, has no apparent interest in the outcome of this case, and is still employed by the Respondent, rendering her testimony highly reliable. Davis, on the other, was, as previously discussed in other respects, not a particularly credible witness.

Finally, testimony from employee Hibbs shows that on October 27, 4 days before the start of the hearing, she received a call from Davis asking if she was willing to meet with Respondent's attorney, Daniel Gwinn, the following day. Davis apparently was meeting with Gwinn when she called Hibbs. When Hibbs expressed uncertainty about meeting with Gwinn because she would have to obtain a babysitter, Davis asked if Hibbs was willing to speak with Gwinn directly. Hibbs agreed, at which point Gwinn got on the phone and asked Hibbs if she would meet with him around 1:15 p.m. the following day. Hibbs repeated that she would try but had to make sure she could get a babysitter for her child. Gwinn then told Hibbs that if she did not cooperate, he could subpoena her. Hibbs told Gwinn to go ahead and subpoena her as it made no difference to her since she had already been subpoenaed. Hibbs recalled Gwinn asking if she had had any discussions with the General Counsel, and Hibbs replied that she had, but could not recall how this particular discussion came up. It appears that at some

point during this conversation, Hibbs volunteered that she had given a sworn affidavit to the Board. Gwinn then asked Hibbs to provide him with a copy of the affidavit she had given to the Board. When Hibbs expressed doubts as to whether it was proper for her to do so, Gwinn stated that she was free to do so as there was no attorney-client privilege between the two of them.

Following that conversation, Hibbs left for home, where she received a call from Davis. Davis told Hibbs that she was getting "bugged" by Gwinn about her affidavit and asked if Hibbs would provide him with a copy. Hibbs agreed to fax a copy to Davis and stated she did not object to Davis faxing it to Gwinn. Hibbs faxed her affidavit to Davis that same day, explaining that she did so in order to get Davis "off her back" and because she "didn't really want to upset the attorney who works for the company that I work for." (Tr. 535–537.) Hibbs' above account of her conversations with Davis and Gwinn was not disputed by Davis, who testified on other matters, or by attorney Gwinn, who was at the hearing but did not take the stand to refute Hibbs' assertions. Accordingly, Hibbs' above testimony is credited.

G. Discussion and Findings

1. The 8(a)(1) allegations

The complaint alleges, and the General Counsel contends, that the confidentiality statement employees are asked to sign is, on its face, overly broad and unlawful. In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board held that in determining whether a challenged rule, like the confidentiality statement at issue here, is unlawful, it initially looks at whether the rule explicitly restricts activities protected by Section 7. If it does, then the rule is deemed to be unlawful, even absent evidence of its enforcement. If, however, the rule does not explicitly restrict activity protected by Section 7, it will be found to be unlawful only upon a showing of one of the following: (1) reasonable employees would construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. See also *U-Haul Co. of California*, 347 NLRB No. 34, slip op. at 3 (2006); *Cintas Corp.*, 344 NLRB No. 118 (2005); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).

Here, the Respondent's confidentiality statement does not explicitly prohibit employees from engaging in protected activity. Nevertheless, the wording therein classifying as "strictly confidential" "any and all information" pertaining to IDA, its employees, or its consumers, and threatening to discipline or discharge employees who violate this rule or policy, is overly broad. The rule, as noted, contains no limitations or exceptions, and simply prohibits the disclosure of "any and all information." There is no record evidence to indicate that employees were ever told that activities otherwise protected by the Act, their right, for example, to freely discuss their wages or other terms and conditions of employment among themselves, were not covered by the confidentiality rule. In the absence of any such explanation or clarification, employees could reasonably construe the rule as prohibiting them from engaging in discussions pertaining to their wages, benefits, and other terms and conditions of employment, a right accorded them under Section 7. Accordingly, I agree with the General Counsel that the Respondent's confidentiality statement is facially unlawful, and that the maintenance of such a rule violates Section 8(a)(1) of the Act, as alleged.

The General Counsel also contends that Romain unlawfully created the impression that the employees' union activities were being kept under surveillance when, on April 4, he asked Abrakian and Lashbrook how the union meeting had gone. The test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his or her union activities had been placed under surveillance. See *North Hills Office Services,* 346 NLRB No. 96 (2006), citing *South Shore Hospital*, 229 NLRB 363 (1977). While it is clear from Foran's credited testimony that Romain had reason to suspect, before his April 4 discussion with Abrakian and Lashbrook, that Foran and possibly other employees might be interested in unionizing, there is no evidence to indicate that Romain or any other management official had been told by Foran or any employee that a union organizational meeting was to be held on April 4. Romain, at most, would have known only of Foran's interest in a union from a prior conversation, but could not have known of the April 4 union meeting since, according to Foran, that meeting had not yet been arranged. While Abrakian clearly took the lead role in organizing and disseminating the information about the April 4 meeting to other employees, there is no evidence to suggest that she did so openly so as to have alerted the Respondent to what she was up to or about her union sympathies.

There is likewise no evidence that Lashbrook, also a union supporter, had openly displayed her prounion stance at any time before the meeting so as to have put the Respondent on notice of where she stood, or given it an opportunity to learn of the April 4 meeting. Thus, when Romain approached them on April 4, and asked how the union meeting had gone, Abrakian and Lashbrook could reasonably have believed that the Respondent had learned of, and was now keeping tabs on, their union activities. On these facts, I find that Romain, by asking Abrakian and Lashbrook how the union meeting had gone, created the unlawful impression that their union activities, and presumably that of other employees, were being kept under surveillance, in violation of Section 8(a)(1) of the Act.[27]

It is further alleged that Romain's remarks to Bibbee, Hibbs, and Gevedon in late March, as they sat around discussing per-

[27] In an affidavit he gave to the Board, Romain claimed to have learned that employees attended the April 4 union meeting after hearing Hibbs make a comment about having gone to the meeting. He was not sure, however, what Hibbs had actually said, how the subject was raised, was unable to recall if he had a conversation with Hibbs on the subject of the meeting, and denies asking her any questions about the meeting. (Tr. 1428.) The statements in his affidavit are too vague to be worthy of belief. Hibbs, as noted, testified to having had only two conversations with Romain in which the Union was discussed, both of which occurred in March. Implicitly, therefore, Hibbs denied telling or revealing to Romain that she had attended the April 4 union meeting. I credit her denial over the suggestion in Romain's affidavit that he learned of the union meeting after the fact.

sonal and some work-related matters, amounted to an unlawful threat of discharge. I agree. As credibly testified by Bibbee and Hibbs, as they and Gevedon were sitting around the Morowske kitchen chatting in Romain's presence, the subject of the Union came up, and Hibbs remarked something about employees not receiving pay raises or holiday pay. In response to their comments, Romain remarked to the three that the Respondent would "mess" with, and try to fire, them if they got involved with the Union. Romain's remark was a clear threat that Bibbee, Hibbs, or Gevedon or any employee could be discharged for supporting the Union. As such, the remark was coercive and a violation of Section 8(a)(1) of the Act.

The complaint also alleges that Romain's questioning of Hibbs about her union sympathies was unlawful. Hibbs, as noted, testified, without contradiction, that, a few days after the above-described conversation, Romain asked her how she felt about the Union while both were on the back patio of the Morowske Home. The test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In making that determination, the Board considers such factors as the background in which the questioning occurred, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, and the truthfulness of the employee's reply. *Professional Medical Transport, Inc.*, 346 NLRB No. 108, slip op. at 4 (2006).

Here, the questioning of Hibbs occurred at the workplace, was conducted by one of her supervisors who, just days earlier, had threatened her and other employees with discharge if they were to support the Union. Although Romain testified on other matters, he was not asked to refute Hibbs' claim that he questioned her about her views on the Union. Consequently, there is no explanation in the record as to why Romain needed to know how Hibbs felt about the Union. Nor is there any evidence to suggest that Romain's question occurred in the context of a friendly, casual conversation the two might have been having, or that the relationship between the two was anything other than a working one. In these circumstances, Romain's questioning, when viewed in light of his earlier threat to Hibbs and others that employees could be discharged for supporting the Union, was clearly coercive. That Hibbs chose to tell Romain that she viewed the Union as a good idea does not render Romain's questioning any less coercive, for Hibbs might have decided to express this particular view in the belief that Romain may have suspected how she felt about the Union based on their prior conversation just days earlier. Accordingly, I find that Romain's questioning of Hibbs on how she felt about the Union amounted to an unlawful interrogation and violated Section 8(a)(1) of the Act, as alleged.

The complaint also alleges that the prohibition imposed on employees on April 14, by Davis and/or Prevatt against engaging in any union-related discussions while they waited to be interviewed was unlawful, as was Prevatt's threat to discharge any employee for doing so. When an employer imposes a restriction on employee conversations, it violates Section 8(a)(1) of the Act if the restriction applies only to union-related talk. *Brandeis Machinery & Supply Co.*, 342 NLRB 530 (2004). Although Davis and Prevatt both claimed that employees were free to discuss nonwork-related matters as they waited to be interviewed, Haack, Lashbrook, Foran, Abrakian, and Hibbs all credibly testified to hearing Prevatt tell employees, following Lashbrook's comment that employees did not have to discuss the Union with Prevatt or Davis, that there was to be no discussion about the Union or they would be terminated. Having found that Prevatt indeed imposed such a restriction on employees during the April 14 meeting, I further find the restriction to have been unlawful and a violation of Section 8(a)(1). *Scripps Memorial Hospital Encinitas*, 347 NLRB No. 4 (2006). The restriction, as noted, applied only to union-related discussions among employees since, according to Prevatt and Davis, employees remained free to discuss other nonwork-related matters. Prevatt's further warning to employees, that they could be discharged if they engaged in any such union talk, was also unlawful and a further violation of Section 8(a)(1) of the Act. *Frazier Industrial Co.*, 328 NLRB 717, 718 (1999).

The Respondent also violated Section 8(a)(1) when, during her interviews of Bibbee and Abrakian, Prevatt questioned them about the Union. Thus, Bibbee credibly recalled being asked by Prevatt if she knew who, during a Morowske Home staff meeting, had brought up the subject of the Union. Abrakian similarly credibly testified to being asked by Prevatt if she knew who was responsible for initiating the union talk at the Morowske Home. The questioning of both, as noted, occurred during a mandatory employee meeting called to investigate allegations of employee misconduct regarding other matters, and was undertaken by Prevatt, a high-level management official not previously known to either Bibbee or Abrakian. Prevatt's questioning therefore did not occur in a friendly, casual, noncoercive setting. The Respondent has offered no explanation for why Prevatt found it necessary to inquire into what Bibbee and Abrakian knew about who might have been responsible for discussing the Union at the Morowske Home. The topic of the Union, according to the Respondent, had no bearing on and was unrelated to the investigation that was conducted on April 14. Consequently, there was no legitimate reason for Prevatt to inquire into such matters. Abrakian's false denial about knowing who was responsible for the union talk at the Home strongly suggests that she found the inquiry coercive. Accordingly, Prevatt's inquiry into whether Bibbee and Abrakian knew who had brought up the subject of the Union during a staff meeting, or who was responsible for the union talk at the Home, amounted to unlawful interrogations and, as previously stated, violated Section 8(a)(1) of the Act.

It is further alleged in the complaint that the Respondent engaged in the unlawful solicitation of employee grievances when Prevatt admittedly asked each employee during her interview if there was anything it could do to improve the workplace or the employees' enjoyment on the job. The Board has held that "[a]bsent a previous practice of doing so, the solicitation of grievances during an organizational campaign accompanied by a promise, express or implied, to remedy such grievances violates the Act." *Maple Grove Health Care Center*, 330 NLRB 775 (2000). There is no question that Prevatt's question to employees on how the Respondent could improve the work-

place or the employees' enjoyment on the job was an attempt by Respondent to elicit from employees grievances they may have had regarding their overall terms and conditions of employment. While a solicitation of grievances alone is not unlawful, it nevertheless raises an inference that the employer is promising to remedy the grievances, an inference that becomes even more compelling when, during a union organizational campaign, an employer that has not previously had a practice of soliciting employee grievances institutes such a practice. Here, there is no evidence to show, nor has a claim been made, that the Respondent had an established past practice, prior to Prevatt doing so during the April 14 interviews, of soliciting and resolving, or promising to resolve, employee grievances. Accordingly, I find that Prevatt's conduct on April 14, of soliciting employee grievances, with the implicit promise of remedying them, constituted a further violation of Section 8(a)(1) of the Act.

Finally, the complaint, as amended at the hearing, alleges, and I agree, that the Respondent further violated Section 8(a)(1) when its attorney, Gwinn, questioned Hibbs about statements she may have made to a Board agent in this case, and then asked her for a copy of the affidavit she gave to the Board. The Board has consistently held that the questioning of an employee as to statements he or she may have given to a Board agent, as well as employer requests for copies of affidavits provided by employees to the Board, is inherently coercive and unlawful. *Wire Products Mfg. Corp.*, 326 NLRB 625, 626 (1998); *Astro Printing*, 300 NLRB 1028, 1029 fn. 6 (1990); *Frascona Buick, Inc.*, 266 NLRB 636, 647 (1983); *Ingram Farms*, 258 NLRB 1051, 1054 (1981).

Although Hibbs on cross-examination stated that she voluntarily told Gwinn that she had given an affidavit to the Board, that revelation by Hibbs was, I find, the product of some subtle coercion, for it occurred the day after her superior, Davis, asked her to speak with Gwinn, after Gwinn threatened to subpoena Hibbs if she did not cooperate with him, and presumably after Gwinn questioned her about discussions she may have had with a Board agent in this case. In these circumstances, Hibbs' disclosure to Gwinn about having given a sworn affidavit to the Board can hardly be viewed as "voluntary" and devoid of coercion. Further, Hibbs' undisputed and credited testimony makes clear that Hibbs gave Davis a copy of her affidavit only after Gwinn had asked for it, and after Davis made clear that Gwinn was bugging her about obtaining a copy of Hibbs' affidavit. Hibbs' stated reason for finally giving in and handing over her affidavit to Davis to deliver to Gwinn, to wit, that she did not want to anger the attorney who was representing her employer in this matter, strongly suggests that Hibbs' decision to comply with Gwinn's request for her affidavit was motivated by fear that not doing so could have adverse consequences for her. Accordingly, I find that Gwinn's conduct in questioning Hibbs about discussions she may have had with a Board agent, and in asking Hibbs for a copy of her Board affidavit, was coercive and, as stated, a violation of Section 8(a)(1) of the Act.

2. The 8(a)(3) allegations

a. Abrakian's discharge

The General Counsel contends that Abrakian was wrongfully discharged for her union activities. The Respondent, on brief, argues that Abrakian was lawfully terminated for violating its confidentiality rule by "[stealing] a budget report from the Morowske Home." (R. Br. 29.) In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983), the Board established a causation test for determining when the discharge or other disciplinary measure taken against an employee violates the Act. Under *Wright Line*, the General Counsel, as part of his or her burden of proof, must make an initial prima facie showing that the action taken against the employee was motivated, at least in part, by his involvement in union or other protected activity. The General Counsel makes out a prima facie case by showing that the employee involved had engaged in union or other protected activity, that the employer knew or was aware of such activity, that it harbored antiunion animus, and that said animus was a motivating factor in the decision taken. Once a prima facie case is established, the burden shifts to the employer to demonstrate by a preponderance of credible evidence that it would have taken the same action against the employee even in the absence of any union or other protected conduct. If, however, the employer's explanation is found to be pretextual—that is, if the reasons cited either did not exist or were not in fact relied on—the employer will not have satisfied its burden and the inquiry is ended at that point. *Tasty Baking Co.*, 330 NLRB 560, 573 (2000); *L.S.F. Transportation*, 330 NLRB 1054, 1074 (2000).

Applying the *Wright Line* analysis to the instant case, the evidence here makes clear that Abrakian was the primary mover of the Union's organizational campaign. Thus, it was Abrakian who, in March, first discussed with Lashbrook and Foran her interest in having a union represent her and other employees, who thereafter contacted several unions to obtain information on how to organize, and who then arranged for the Union to meet with employees on April 4. Abrakian was also responsible for notifying employees about the April 4 union meeting, attended that meeting as well as other union meetings held between April 14, and her discharge date, and signed a card authorizing the Union to represent her for collective-bargaining purposes.

The record also shows that the Respondent was fully aware of Abrakian's involvement with the Union before discharging her. As noted, after returning to the Morowske Home following the April 4 union meeting, Supervisor Romain asked her how the meeting had gone, suggesting that he knew that Abrakian had gone to the meeting. Further, the April 11 letter purportedly written by Schwark at Davis' behest, and which Davis I am convinced read at some point before the April 14 interviews, identified Abrakian as having been at the April 4 union meeting. It is clear, therefore, and I find, that the Respondent knew of Abrakian's prounion sympathies and activities before firing her.

Finally, the numerous above-described 8(a)(1) violations committed by the Respondent, which included threats of discharge for union supporters, coercive interrogation of employees as to their union activities, prohibiting union talk among employees while allowing other nonwork-related discussions, creating an impression that the employees' union activities were being kept under surveillance, and soliciting and implicitly promising to remedy employees grievances in order to dissuade them from supporting the Union, all amply support a finding that the Respondent harbored animosity towards the Union and its supporters. Accordingly, I find that the General Counsel has made a prima facie showing that the discharge of Abrakian on April 25, was motivated, if not wholly, at least in part, by her involvement with the Union. The burden under *Wright Line* now shifts to the Respondent to demonstrate by a preponderance of credible evidence that it would have discharged Abrakian even if she had not engaged in any union activity. *Riverboat Services of Indiana, Inc.*, 345 NLRB No. 116, slip op. at 9 (2005).

The Respondent has not done so here. Thus, the Respondent has failed to provide a clear, consistent, and credible explanation for Abrakian's termination. In Abrakian's April 25 discharge letter, for example, the Respondent cited "theft, misappropriation, and misuse of Company property" as the sole reasons for her dismissal, describing the above-described misconduct as consisting of Abrakian's removal of the Company budget from the Home without permission and sharing it with others outside the workplace. Pettyplace at the hearing again defined the "theft, misappropriation, and misuse of Company property" to mean that Abrakian was discharged for "copying and taking the Company's financial records from the Home and sharing it with others." However, at the hearing, the Respondent also asserted, for the first time, that Abrakian's conduct in removing a copy of the budget from the home violated its confidentiality rule and that said violation was a factor in her termination. Abrakian's discharge letter, as noted, makes no mention of this alleged violation of the confidentiality rule as a basis for her discharge.

In its posthearing brief, the Respondent again cites theft as a reason for the discharge, claiming the theft violated its confidentiality rule. (R. Br. 29.) Thus, the Respondent avers in its brief that regardless of what she subsequently did with the copy of the budget, "Abrakian was terminated because she stole a budget report from the Morowske Home."[28] It explained that the budget was a sensitive document and not for the use of employees, and that Abrakian's removal of the budget from the property, without more, amounted to a "misappropriation of sensitive company property" in violation of the confidentiality rule, and justified her discharge. Notwithstanding its latter claim that it was the mere removal of the budget from the Home, and inferentially not what she did with it afterwards, that led to Abrakian's discharge, elsewhere on brief, the Respondent, in what I am convinced was a continuing attempt to cover all bases regarding the discharge, added to its list of reasons by asserting that Abrakian was discharged for taking a copy of the budget to the April 4 union meeting. Thus, the Respondent avers on brief (p. 2) that "IDA discharged Abrakian because Abrakian admitted to taking a financial budget sheet from the Morowske Home to [the] Union meeting." Neither Abrakian's discharge letter, nor Pettyplace at the hearing, as noted, cited Abrakian's taking of the budget with her to the union meeting as a grounds for the discharge. Its claim on brief, that it was the mere removal of the budget from the Home which justified and led to Abrakian's discharge, neither squares, or is consistent, with the Respondent's new assertion on brief that Abrakian was discharged for taking the budget to the union meeting, or with Pettyplace's assertion in her testimony that Abrakian was discharged for removing a copy of the budget from the home *and sharing it with others*." The Board has held that when, as here, an employer provides inconsistent or shifting reasons for its actions, a reasonable inference may be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive. *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997); also *Mt. Clemens General Hospital*, 344 NLRB No. 54, slip op. at 9 (2005); *Holsum De Puerto Rico, Inc.*, 344 NLRB No. 85, slip op. at 21 (2005). I find such an inference fully warranted here.

Further, the Respondent's assertion that Abrakian was discharged for sharing the budget with others is also pretextual. Pettyplace, as noted, claimed that Abrakian admitted having done so during her April 14 interview. Abrakian, however, credibly denied making any such admission during her interview. As Pettyplace was not present during Abrakian's, or any of the other, interviews, her information as to what Abrakian may have said came from Prevatt, and from Respondent Exhibit 7, Prevatt's alleged interview notes, and Respondent Exhibit 32, Davis' notes. However, as found above, Prevatt was not a credible witnesses, and her claim that Abrakian made such an admission was rejected as not credible, as being inconsistent with Abrakian's more credible denial, and as finding no support in Respondent Exhibits 7 or 32. The Respondent, it should be noted, produced no evidence, other than its false assertion that Abrakian admitted doing so during her interview, to show that Abrakian indeed shared the budget with others either at the Union or elsewhere. The April 11 letter, purportedly prepared by Schwark at Davis' request describing what transpired during the April 4 union meeting, which I am convinced is the genesis for the claim that Abrakian shared the budget with others, makes no mention of Abrakian having done so. Schwark, who might have been able to shed some light on this matter, was not called to testify. Accordingly, as Abrakian never told Prevatt in her interview that she had shared the budget with others, the Respondent's assertion that she did so is false, rendering specious and pretextual its claim that it discharged her for this reason. When a respondent's stated reasons for its actions are found to be false (i.e., "pretextual reasons"), discriminatory motive may be inferred. *Pontiac Care & Rehabilitation Center*, 344 NLRB No. 92 (2005).

As to its reliance on the confidentiality rule to support Abrakian's discharge, the Respondent, as noted, never cited

[28] The assertion that Abrakian "stole" the budget is not entirely accurate, for while Abrakian admits making a copy of the budget and taking it with her when she left Morowske Home that day, she left the original copy of the budget where she found it, next to the fax machine. Thus, she did not "steal" the budget as charged by the Respondent.

Abrakian's alleged breach of this rule in its discharge letter as a reason for the discharge, but rather raised it for the first time at the hearing. The discharge letter states only that Abrakian, inter alia, took the budget from the Home without permission "knowing that it was Company property." Consequently, the Respondent's claim, raised for the first time at the hearing, that Abrakian was discharged for violating its confidentiality rule, appears to have been more of an afterthought designed to guarantee that Abrakian's discharge would stick. Its claim, therefore, that Abrakian was discharged for violating its confidentiality rule is nothing more than a pretext intended, I am convinced, to mask another unlawful motive.

The Respondent, in any event, could not have properly discharged Abrakian for violating the confidentiality rule for, as found above, that rule is facially invalid and unenforceable because its classification of "any and all information" pertaining to, among other things, the business and employees as strictly confidential, the disclosure of which could lead to dismissal, could reasonably be construed as prohibiting employees from engaging in Section 7 protected activity, including discussing wages, hours, and other terms and conditions of employment among themselves. The disciplining, or in this case, discharge of an employee pursuant to such an invalid rule is itself unlawful. *Convenience Food Systems,* 341 NLRB 345, 351 (2004).

There are, in any event, sound reasons for doubting the Respondent's claim that the budget was a confidential document. Haack, as noted, received it from Davis after repeated requests for the budget. The document itself, unlike others received by Haack that day, was not labeled or stamped confidential, and Haack, who had never before been given the budget, received no instructions on how she was to handle it, or directive from Davis or anyone else from management that the budget was a confidential document not to be disclosed to anyone. In fact, Haack, who as a supervisor could reasonably be expected to distinguish between confidential and nonconfidential documents, treated the budget as a nonconfidential document by leaving it unsecured next to the Home fax machine, an area open to both employees and nonemployees at the Home. Haack, on the other hand, secured other documents received from Davis clearly marked and stamped "confidential" by sliding them under the locked door to her office. If Haack knew or had reason to believe that the budget was a confidential document, I am convinced she would have secured it in the same manner as she did the other documents so labeled, and would not have left it out in the open next to the fax machine. Nor, I am further convinced, would she have shown and discussed the budget with Lashbrook, and risked being discharged, had she known or been told by upper management that the budget was not to be "disseminated for the use of employees," as the Respondent on brief claims was the policy regarding the budget.

In sum, other than the Respondent's bare assertion to the contrary, there is no evidence to show that the Respondent had, in the past, viewed or treated its budget as a confidential document. If it was the Respondent's intent that the budget be treated as confidential, that fact was never communicated or made known to its own supervisor, Haack, or to employees in general, including Abrakian. Thus, even if the Respondent's confidentiality rule was deemed to be valid, which, as found above, it is not, the Respondent nevertheless could not have discharged Abrakian for violating the rule by removing a copy of the budget from the Home for it has not demonstrated that the budget was, in fact, a confidential document. As noted, Respondent's reliance on the confidentiality rule to support Abrakian's discharge was not cited in her discharge letter as a reason for her termination, and was, instead, raised for the first time at the hearing. I am convinced that this explanation was more of an afterthought designed to bolster the termination decision. As such, the Respondent's reliance on the confidentiality rule to support the discharge, like the other varying and shifting explanations proffered at the hearing and on brief, is nothing more than a pretext designed to conceal the Respondent's true motive for discharging Abrakian, e.g., her support for the Union. Accordingly, I find that the Respondent has not come forth with a legitimate, nondiscriminatory reason for discharging Abrakian, or demonstrated that it would have discharged Abrakian even if she had not engaged in any union activity. Having failed to rebut the General Counsel's prima facie case, I further find that the Respondent's discharge of Abrakian on April 25, violated Section 8(a)(3) and (1) of the Act, as alleged.

b. Lashbrook's and Foran's discharge

Lashbrook and Foran, as noted, are also alleged to have been unlawfully discharged for their union activities. There is no disputing, and the Respondent does not contend otherwise, that both Lashbrook and Foran were union supporters and that the Respondent knew of their union sympathies before firing them. Like Abrakian, both attended and spoke out at the April 4 union meeting, and signed cards authorizing the Union to represent them. Lashbrook, like Abrakian, was questioned by Romain on how the meeting had gone, making clear that Romain knew she had been at the union meeting. Foran made her prounion views known to Romain sometime in March. Further, the April 11 letter that Davis claims to have received from Schwark discussing what occurred at the April 4 union meeting identifies Lashbrook and Foran as having been in attendance. Evidence of Respondent's animosity towards the Union and its supporters, which includes Lashbrook and Foran, was discussed above in connection with Abrakian's unlawful discharge and will not be repeated here. The evidence thus convinces me, and I find, that the General Counsel has made a prima facie showing that Lashbrook and Foran were unlawfully discharged for their union activity.

The Respondent contends that Lashbrook and Foran were lawfully discharged for "fabricat[ing] the existence of a doctor's appointment on April 4, 2005 to cover up taking a company van and attending a union meeting on company time." (R. Br. 1.) Pettyplace, who made the decision to discharge Lashbrook and Foran, claimed that the circumstances leading up to the terminations were fully investigated, and that "we terminated everyone's employment involved here based on their own testimony, the information that they gave us." (Tr. 803; 916.) Several factors convince me that the Respondent's rationale for discharging Lashbrook and Foran is akin to the proverbial house of cards based on nothing more than on false

assumptions, speculation, and conjecture, rather than on any real evidence.

According to the Respondent, Lashbrook and Foran violated Company policy by using the Morowske van to attend the union meeting on April 4, and points to the report it received from Schwark, General Counsel Exhibit 33, as the basis for its belief that Lashbrook and Foran had engaged in such conduct. This argument is flawed in several respects. First, there is no credible evidence to show that Lashbrook and Foran indeed used the Morowske van to go to the meeting. Both in fact testified, credibly I find, that they went to, and returned from, the April 4 union meeting in Lashbrook's own vehicle. Further, General Counsel Exhibit 33, Schwark's alleged written report on which the Respondent bases its claim, states only that Schwark purportedly observed the Morowske van at the union meeting, but does not say that Schwark actually saw Lashbrook or Foran driving the van to or from the meeting. Rather, the letter states only that because Schwark did not see either Lashbrook's or Foran's car in the union parking lot, she simply assumed that one or both must have driven to the meeting in the Morowske van. Thus, the Respondent could not possibly have relied on this alleged written report from Schwark as a grounds for discharging Lashbrook or Foran for misuse or misappropriation of the Morowske van. Further, the assertion in General Counsel Exhibit 33 attributed by the Respondent to Schwark, that the Morowske van was at the union meeting on April 4, was, as noted, disputed not only by Lashbrook and Foran, but also by the other employees who attended the meeting and who testified in this proceeding. Nor can the Respondent rely on anything contained in General Counsel Exhibit 33 to justify the discharges, for that document, as previously discussed and found, is unreliable and untrustworthy and has no evidentiary value. It is not even clear, for example, if General Counsel Exhibit 33 was indeed prepared by Schwark. Nor is there any evidence, other than Davis' own suspect and questionable testimony, to show that Schwark orally informed Davis about seeing the van at the union meeting. Schwark, as noted, was not called to testify on these matters despite Respondent's representation at the start of the hearing that it intended to call her as a witness.

In sum, there is no credible evidence to show that the Respondent was notified by Schwark that Lashbrook and Foran drove to the April 4 union meeting in the Morowske van, for even if General Counsel Exhibit 33 could be considered a reliable and trustworthy document, Lashbrook and Foran, as noted, credibly denied doing so, and Schwark was not called as a witness to refute their claims. Further, the claim in General Counsel Exhibit 33, allegedly made by Schwark, that the Morowske van was at the union meeting, was credibly disputed by other employee witnesses at the hearing. Finally, even if General Counsel Exhibit 33 were deemed credible enough to be entitled to some weight, and it is not, it would not support the Respondent's claim, for General Counsel Exhibit 33, as noted, does not say that Lashbrook and Foran were seen driving the Morowske van to and from the union meeting, only that Schwark presumed they had done so because she failed to notice their private vehicles in the union parking lot. Accordingly, the Respondent's claim that Lashbrook and Foran improperly used the Morowske van to attend the April 4 union meeting is baseless and devoid of record support. Its assertion, therefore, that it discharged Lashbrook and Foran, in part, for doing so, is rejected as without merit and as nothing more than a pretext.

The Respondent next argues that to cover up their misconduct in driving the Morowske van to the April 4 union meeting, Lashbrook and Foran falsified several documents to reflect that they used the van on April 4, to take Dugal to a doctor's appointment, not to go to the union meeting. In support of its claim, the Respondent contends that Lashbrook and Foran both admitted during their respective April 14 interviews to taking Dugal to the doctor on April 4, even though the record makes clear, and indeed the parties' stipulated, that no such appointment occurred that day. There are several problems with the Respondent's argument.

First, there was no need for Lashbrook and Foran to hide what the Respondent contends was their misconduct in taking the van to the union meeting because, as found above, that alleged misconduct never occurred. Further, Lashbrook and Foran credibly denied telling Prevatt and/or Davis during their interviews that they took Dugal to the doctor on April 4. Prevatt's and Davis' claim that both Lashbrook and Foran admitted during their interviews having done so was, as found above, not credible. Nor can the Respondent rely on Respondent Exhibits 7 and 32 to support its claim that Lashbrook and Foran admitted going to the doctor on April 4. For the reasons previously discussed, there are simply too many inconsistencies and discrepancies regarding the accuracy and reliability of Respondent Exhibit 7 to warrant giving it any weight. As to Respondent Exhibit 32, Davis' notes, the entries therein for Lashbrook make no mention of Lashbrook having been asked about a doctor's visit on April 4, or an admission by Lashbrook that she took Dugal to the doctor on that day. The entries in Respondent Exhibit 32 reflecting Foran's interview, however, does show Foran describing her activities for April 4, and an entry reflecting a visit by her and Lashbrook to the doctor that day.

As previously discussed, Foran insisted at the hearing, contrary to the entry in Respondent Exhibit 32, that at no time was the date of April 4 mentioned to her during her interview, and that she simply assumed Prevatt was asking her about the April 7 doctor's visit she and Haack took Dugal to on that day. I resolve this obvious discrepancy between Foran's testimony and the entry in Respondent Exhibit 32 in Foran's favor. Davis, as noted, readily admitted that her interview notes are incomplete and do not reflect everything that was said during the employee interviews. As such, Respondent Exhibit 32 does not accurately reflect the substance of all that transpired during the interviews, including, presumably what was or was not asked of Foran during her interview. Further, Davis herself, as already discussed, was not a particularly credible witness. Given her own unreliability as a witness, her admission that Respondent Exhibit 32, her interview notes, is incomplete and does not contain all that transpired during Foran's and the other employees' interviews, and the various inconsistencies between Davis' testimony at the hearing and the contents of Respondent

Exhibit 32,[29] I find that the entry in Respondent Exhibit 32 showing Foran describing her activities for April 4, as including a trip to the doctor, not to be accurate. I find instead, as testified to by Foran, that she, like Lashbrook, was never asked by Prevatt or Davis if she had taken Dugal to the doctor on April 4, and that the statement attributed to her in Respondent Exhibit 32 about a visit to the doctor pertained to Dugal's April 7 appointment.

The Respondent also points to what it contends were alterations or falsifications of certain Morowske Home documents as proof that Lashbrook and/or Foran engaged in a deliberate deception regarding their activities on April 4. There are, to be sure, certain discrepancies regarding entries found in some Morowske Home documents which tend to show that Dugal was taken to the doctor on April 4, even though it is clear no such visit occurred. Nevertheless, the Respondent has not demonstrated that either Lashbrook or Foran doctored, or were in any way responsible for, falsifying these questionable documents. The credible evidence of record makes clear that at no time prior to their discharges were Lashbrook or Foran shown the documents in question or given an opportunity to see or explain the entries. Prevatt's assertion at the hearing, that both Lashbrook and Foran were presented with some of these documents, as previously discussed, was denied by Davis and undermined by Romain's own testimony, and patently false. Rather, the evidence makes clear that the Respondent simply assumed that Lashbrook and/or Foran had falsified documents without questioning them about it. The failure to give an employee an opportunity to explain the circumstances for which he or she is being disciplined or discharged supports a finding of pretext. *Diamond Electric Mfg. Corp.*, 346 NLRB No. 83, slip op. at 4 (2006); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002).

Indeed, some of the suspect entries relied on by the Respondent on the documents in question could reasonably have been explained. Pettyplace, for example, concluded that Lashbrook and/or Foran had falsified the van log on April 4, by recording their destination information in advance of their trip that day, in contravention, she contends, of Company policy. Pettyplace's assertion, however, was disputed by Davis, who testified that it is the practice of employees to complete the destination information called for in the van log before embarking on the trip. Respondent's additional claim, for example, that Lashbrook and Foran had gone to the union meeting on Company time on April 4, is patently untrue, for both Lashbrook and Foran credibly testified to having asked, and receiving permission from, their Supervisor Haack to leave work early that day, e.g., at 11 a.m. Haack, who could have explained this to Pettyplace, Prevatt, or Davis, was never given an opportunity to do so, even though she too was present for the April 14 interviews. The Respondent's failure to question Haack about this and other matters relating to its investigation of the April 4 events, like its failure to question the alleged discriminatees about the disputed documents, further reflects an unwillingness on its part to get at the truth. Indeed, its conduct in this regard, coupled with Davis' and Prevatt's testimony suggesting their belief, prior to the April 14 interviews, that documents had been falsified and that Lashbrook and/or Foran were the guilty parties, strongly indicates that the Respondent may have made up its mind to discharge Lashbrook and Foran before the April 14 interviews, and that the interviews were designed to provide it with some cover in the event the discharges were subsequently challenged. The interviews themselves, as gleaned from Prevatt's description of how she approached and conducted them, was more inquisitorial in nature, rather than an honest attempt to ascertain what occurred on April 4, and how or why the documents in questioned were altered.

Further, there, with respect to Lashbrook, the claim, raised for the first time at the hearing by Pettyplace, that her discharge was also based on the write-up issued to her on April 8, for not recording in the med sheet that Dugal had been prescribed Senokot during his doctor's visit. This additional reason for Lashbrook's discharge appears to have been an afterthought, as it was never mentioned in Lashbrook's discharge letter as a ground for termination. As previously discussed, an employer's shifting explanation for disciplinary action taken supports an inference of pretext. See *GATX Logistics, Inc.*, supra, and other cases cited in connection with Abrakian's discharge.

As to Foran, the Respondent, as noted, also cited as a ground for her discharge Foran's alleged failure to admit during her interview to having the keys to the Morowske Home. However, no credible evidence was produced to show that Foran indeed refused to admit possessing the Morowske Home during her interview, rendering the Respondent's claim in this regard as patently false. As noted, where an employer's stated reason for a discharge is found to be false, a finding is warranted that the reason given is nothing more than a pretext designed to hide another unlawful motive. *Pontiac Care & Rehabilitation Center*, supra.

Finally, the Respondent, on brief (R. Br. 29, fn. 5), cites Foran's alleged failure to report a recent drunk driving conviction, as required by policy, as also "grounds for her termination." Again, this particular argument was never cited in Foran's discharge letter as a basis for her termination. Further, while Foran was questioned about it at the hearing, Pettyplace never asserted this in her testimony as a reason for Foran's termination. Rather, the argument is being raised for the first time in the Respondent's brief. This post hoc attempt by the Respondent on brief to support its discharge of Foran by raising a new reason not previously raised supports a finding that the reason cited is nothing more than a pretext. As previously discussed, an employer's shifting explanation for a discharge, or, as here, its post hoc attempt to rationalize such a decision, are suggestive of a pretext. *Aljoma Lumber, Inc.*, 345 NLRB No. 19 (2005). Nor can the Respondent simply cite this reason to show that it could have discharged Foran for allegedly failing to report a drunk driving incident, for an employer cannot meet its burden under *Wright Line* simply by pointing to a potentially legitimate reason for its adverse action. Rather, it must demonstrate that it, in fact, relied on a nondiscriminatory reason for its

[29] By way of example, Davis' claim at the hearing that Foran during her interview refused to admit having the keys to the Morowske Home is found nowhere in R. Exh. 32. Nor is her claim at the hearing that Abrakian denied removing a copy of the budget from the Home found in R. Exh. 32.

actions. *Diamond Electric*, supra, slip op at 6; *Riverboat Services of Indiana, Inc.* supra.

In sum, I find that the reasons cited by the Respondent for discharging Lashbrook and Foran on April 25, are mere pretexts. As such, the Respondent has not rebutted the General Counsel's prima facie showing that Lashbrook and Foran were in fact discharged for their union activity. Accordingly, I find that Lashbrook's and Foran's discharges were unlawful and violated Section 8(a)(3) and (1) of the Act, as alleged.

c. Bibbee's discharge

According to the Respondent, Bibbee was lawfully discharged after being caught by Davis sleeping on the job on June 10. While not disputing that Bibbee was caught sleeping on the job, the General Counsel nevertheless contends that the Respondent simply used this particular misconduct by Bibbee as a pretext to rid itself of another union adherent, rendering the discharge unlawful. That Bibbee was a union supporter is not disputed, for she too attended the April 4 union meeting, and signed a union authorization card. Nor can it be disputed that the Respondent knew of her above activity, for the April 11 letter, which the Respondent contends was written by Schwark, identifies Bibbee as being in attendance. The Respondent, as previously discussed, harbored animosity towards the Union and its supporters. In these circumstances, I find that the General Counsel has a made a prima facie showing sufficient to support an inference that Bibbee's discharge was discriminatorily motivated, if not wholly at least in part, by antiunion considerations. Accordingly, the burden shifts to the Respondent to demonstrate that it would have discharged Bibbee even if she had not been a union supporter. The Respondent has met that burden here.

As noted, the Respondent maintains a policy strictly prohibiting employees from sleeping while on duty, which Bibbee acknowledged being familiar with. With the exception of one instance cited by the General Counsel in support of a disparity of treatment claim, the Respondent has, in the past, discharged employees for engaging in similar misconduct, e.g., sleeping on the job. (See R. Exh. 36.) The record, for example, shows the following former Morowske Home employees were discharged for sleeping on the job: Jeremy Thomson, discharged on April 30, 2004; Pha Swanson, discharged April 30, 2004; Kassandra Johnson, discharged on January 6, 2000. Further, as evidenced by the numerous other terminations listed in Respondent Exhibit 36, the Respondent's "no sleeping on the job" restriction has been applied to Respondent's other homes. In sum, Bibbee's discharge for sleeping on the job, which she admits doing and which she herself believed would result in her termination, was consistent with the Respondent's established practice.

The General Counsel, however, claims that Bibbee was disparately treated vis-à-vis Jenkins for the same misconduct, that the only distinction between the two is that Bibbee was a union supporter while Jenkins was not, and that this disparity of treatment warrants an inference that Bibbee was terminated for her union sympathies. The General Counsel contends that the Respondent simply and conveniently seized upon Bibbee's misconduct of sleeping on the job as a way of masking its true motive for the discharge, and that the reason given amounts to nothing more than a pretext. It is true that Byrd, as found above, reported seeing Jenkins asleep on two separate occasions in April, and that, upon reporting these incidents to Davis, was told about 1 week later by Davis to essentially ignore Jenkins' conduct because Jenkins was apparently tired from working double shifts. While Davis' response to these reported incidents are troubling and might suggest a disparity in treatment, I remain unconvinced from this single apparent aberration in the Respondent's strict adherence to its no sleeping policy that Bibbee would not have been terminated but for her union activity. I note in this regard that the facts surrounding the Jenkins sleeping incident are somewhat different from the incident involving Bibbee. In Bibbee's case, Jenkins was caught napping by Davis herself, a fact which, I am convinced, would have been sufficient to sustain the discharge. Jenkins, on the other hand, was observed only by Byrd, another employee, sleeping on the job. Pettyplace testified that the Respondent will not discharge an employee for sleeping on the job based on the report of a single employee, explaining that this is to prevent a false accusation from being made for personal reasons or animosity. (Tr. 906–907.) Pettyplace's testimony in this regard is accepted as true, particularly since there is evidence in the record of an employee having been discharged after being caught sleeping on the job by a Home supervisor only. Accordingly, I find that the Respondent has effectively rebutted the General Counsel's prima facie case, and that Bibbee was lawfully discharged for sleeping on the job and not for engaging in union activity. I shall therefore recommend dismissal of this particular complaint allegation.

CONCLUSIONS OF LAW

1. The Respondent, Inter-Disciplinary Advantage, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining an overly-broad confidentiality rule that restricts employees in the exercise of their Section 7 rights, by creating the impression that it was keeping its employees' union activities under surveillance, by threatening to discharge employees who engage in union activity, coercively interrogating employees about the union activities, by prohibiting employees from talking about the Union at the workplace while allowing other nonwork-related discussions, by soliciting and implicitly promising to remedy employee grievances, by coercively interrogating employees about discussions they may have had with Board agents, and asking that employees provide them with copies of affidavits given to the Board, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By terminating the employment of employees Kelly Lashbrook, Linda Foran, and Marie Abrakian for engaging in union activities, the Respondent has violated Section 8(a)(3) and (1), and Section 2(6) and (7) of the Act.

3. Except as set forth above, the Respondent has not engaged in any other unfair labor practices that were alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy its discriminatory discharge of employees Lashbrook, Foran, and Abrakian, the Respondent shall be required to offer them reinstatement to their former or substantially equivalent positions if their former positions no longer exist, and to make them whole for any loss of earnings and other benefits they may have suffered, to be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest on such amounts as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It shall also be required to remove from its files any and all references to their unlawful discharges, and to notify each of them in writing that it has done so and that their discharges will not be used against them in any way.

Further, the Respondent will be required to rescind and not give effect to its overly-broad confidentiality statement, and to post an appropriate notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, Inter-Disciplinary Advantage, Inc., Midland, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and giving effect to its overly-broad confidentiality statement, prohibiting employees from talking about the Union while allowing other nonwork-related discussions by employees, creating the impression that employees' union activities are being kept under surveillance, threatening to discharge employees who engage in union activities, coercively interrogating employees about their union activities, soliciting and implicitly promising to remedy employee grievances, interrogating employees about discussions they may have had with Board agents, and requesting that employees provide them with affidavits they may have given to the Board.

(b) Discharging or otherwise discriminating against employees Kelly Lashbrook, Linda Foran, Marie Abrakian, or any other employee for supporting International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and cease giving effect to its confidentiality statement.

(b) Within 14 days from the date of the Board's Order, offer Kelly Lashbrook, Linda Foran, and Marie Abrakian full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

(c) Make Kelly Lashbrook, Linda Foran, and Marie Abrakian whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Kelly Lashbrook, Linda Foran, and Marie Abrakian, and within 3 days thereafter, notify them in writing that this has been done and that their discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Morowske Home facility in Macomb County, Michigan, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 2005.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a confidentiality rule that restricts you from fully exercising the rights accorded to you under Section 7 of the National Labor Relations Act; WE WILL NOT create the impression that your union activities are being kept under surveillance; WE WILL NOT threaten you with discharge for engaging in union activities; WE WILL NOT coercively interrogate you about your union activities; WE WILL NOT prohibit you from talking about the union at the workplace while allowing other nonwork-related discussions; WE WILL NOT unlawfully solicit and implicitly promise to remedy your grievances in order to discourage your support for a union; WE WILL NOT coercively question you about discussions you may have had with agents of the National Labor Relations Board; and WE WILL NOT ask you to provide us with copies of affidavits you may have given to the Board.

WE WILL NOT discharge or otherwise discriminate against employees Kelly Lashbrook, Linda Foran, Marie Abrakian, or any of you for supporting International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Kelly Lashbrook, Linda Foran, and Marie Abrakian full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Kelly Lashbrook, Linda Foran, and Marie Abrakian whole for any loss of earnings and other benefits resulting from their unlawful discharge, less any net interim earnings, plus interest

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Kelly Lashbrook, Linda Foran, and Marie Abrakian, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

INTER-DISCIPLINARY ADVANTAGE, INC.